



महाराष्ट्र शासन राजपत्र

भाग एक-ल

वर्ष ६, अंक ३८]

गुरुवार ते बुधवार, डिसेंबर ४-१०, २०१४/अग्रहायण १३-१९, शके १९३६

[पृष्ठे ४०, किंमत : रुपये २३.००

प्राधिकृत प्रकाशन

(केंद्रीय) औद्योगिक विवाद अधिनियम व मुंबई औद्योगिक संबंध अधिनियम यांखालील
(भाग एक, चार-अ, चार-ब आणि चार-क यांमध्ये प्रसिद्ध केलेल्या अधिसूचना, आदेश व निवाडे यांव्यतिरिक्त)
अधिसूचना, आदेश व निवाडे.

IN THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

APPEAL (ICTU) No. 1 of 2002.—Mahanagarpalika Karmachari Sangh, 2093, C. Somwar Peth, Kolhapur, through its President and General Secretary.—*Appellant*.—*Versus*—(1) The Additional Registrar, Trade Union, Trade Unions Act, 1926, Office of the Upper Commissioner of Labour, Bunglow No. 5, Shivaji Nagar, Pune.—*Respondent No. 1*; (2) The Dy. Registrar, Trade Union, Trade Unions Act, 1926, Office of the Upper Commissioner of Labour, Bunglow No. 5, Shivaji Nagar, Pune.—*Respondent No. 2*.

In the matter of Appeal u/s. 11 of the Trade Unions Act, 1926.

CORAM.—Shri C. A. Jadhav, Member.

Appearances.—Shri D. S. Joshi, Advocate for the Appellant.

Shri S. R. Pisal, Assistant Government Pleader for the Respondents.

Judgement

This is an Appeal under section 11 of the Trade Unions Act, 1926 by a Registered Trade Union challenging legality of order dated 5th December 2002 passed by Respondent No. 1 Additional Registrar under the Trade Unions Act cancelling its Certificate of Registration as a Trade Union.

2. Admittedly, the Appellant Mahanagarpalika Karmachari Sangh (hereinafter referred to as the Union) is registered under the Trade Unions Act, *vide* Registration No. PN-800/76. It has its own Constitution and Bye-laws. Respondent No. 1 Additional Registrar and Respondent No. 2 Deputy Registrar are appointed by the Appropriate Government and are statutory authorities under the Trade Unions Act.

3. The Deputy Registrar sent letter dated 30th May 2002/3rd June 2002 to the Union stating that his office has received many complaints that the Union has not conducted the elections after the year 1994 and hence functioning of Union's Executive Council is illegal and unconstitutional. It was then informed that functioning of the Executive Council and Office-bearers of the Union in violation of the Constitution is illegal and they will be responsible for the consequences if continue to work in such a fashion. The Union then gave reply dated 16th June 2002 to the letter/notice.

4. The Deputy Registrar then served another notice dated 19th June 2002 upon the Union stating that the Union was bound by its Constitution to hold election of Executive council and office bearers after February, 1994 but no such elections are held by violating the Constitution. He then alleged that Complaints are received regarding Executive Council's meeting dated 24th May 2002 and passing resolution therein of holding elections. It was then warned that the Union should not violate the Constitution and the Executive Council will be solely responsible for the acts in violation of the Constitution. The Union gave second reply dated 24th June 2002 that its daily working is stopped, however, process of election is already started and new Office Bearers will be elected as per the Constitution.

5. Assistant Registrar then served letter/notice dated 26th July 2002 upon the Union alleging that election of its Office-bearers is illegal and to show cause as to why its Registration, by invoking the powers under section 10(b) of the Trade Unions Act, should not be cancelled. The Union then gave third reply dated 19th September 2002 raising multifold contentions. Respondent No. 1 then passed impugned order on 5th December 2002 cancelling Union's Certificate of Registration by exercising power under section 10(b) of the Trade Unions Act on the ground that Union's explanation is unsatisfactory and it has violated sub-rules (2) and (5) of Rule 22 of its Constitution. Said order is challenged in this Appeal.

6. It is contended in the Appeal Memo that a Resolution to hold elections was already passed in Executive Council's Meeting dated 24th May 2002 and it was informed to the Additional Registrar by reply dated 24th June 2002. Likewise, the Returning Officer Advocate Shri Ghatage has informed the Deputy registrar by letter dated 28th June 2002 that election of the office bearers of the Union will take place from 28th June 2002 to 30th June 2002. Thus, procedure of Election had already commenced on 24th May 2002 itself and there are no complaints regarding results thereof. As such, there is no breach of the Constitution as well as Rules thereunder. It is further contended that there is no breach of section 6(h) of the Trade Unions Act and there is no reason or justification to cancel the Registration. Annual Returns and its contents were nowhere objected by the Additional and Deputy Registrar. In addition, no opportunity of being heard was extended prior to passing impugned order. The Union cannot function without office bearers. Impugned order is cryptic without application of mind and is pre-determined. No copies of complainants. If any, were delivered though demanded. As such, impugned order is made with an ulterior as well as political motive.

7. I heard the learned Advocate representing the Union as well as learned Assistant Government Pleader representing the Respondent *i.e.* Registrars, at length.

8. Considering rival submissions. Following points arise for my determination.

(i) Whether impugned order cancelling certificate of Registration, passed under section 10 (b) of the Trade Unions Act on the ground of violating Sub Rules (20 and (5) of Rule 22 of Union's Constitution is legal and proper ?

(ii) What order ?

9. My findings, on above points, are as under :—

(i) No,

(ii) The Appeal is allowed.

Reasons

10. It has come on the record that the Union challenged impugned order by filing a civil Suit in the Court of Civil Court, Sr. Division, Kolhapur. The Union then filed an application in said suit for permission to withdraw the same with liberty to prefer an appeal before proper forum. Learned Joint Civil Judge, Sr. Division, Kolhapur then returned the plaint to the Plaintiff Union. Section 11 (a) of the Trade Unions Act is amended on 3rd September 2001 whereby jurisdiction to challenge Registrar's order of cancelling certificate of registration is conferred upon this Court. Therefore, the union has preferred this Appeal.

11. To appreciate rival contentions, it is necessary to state, at the outset, some material facts which are well established on the record. The Respondents have filed original record and proceeding. With list Exh. C-1.

12. The Union has its own constituting and Bye-Laws. Rule 12 (a) says that office bearers and Managing Committee is entrusted with the management of the Union. Sub-Rule (3) thereof says that Office-bearers and Managing Committee will continue to function till new are elected. Sub-Rule (2) of Rule 22 says that election of the members of the General Executive Council will be held in January or February, they will function for 5 years and the existing Council will continue to function till February, 1994. Sub rule (5) of Rule 22 says that term of office of members of General executive Council and Managing Committee is to be extended by one year, if elections are not possible. It is also an admitted position that no election took place but a resolution to hold election came to be passed in Executive council's meeting dated 24th May 2003 i.e. prior to initiation of any action by the Registrars Likewise, the Union sent Annual returns, from time to time to the Registrar stating all details of its office-bearers but those were never objected by the Registrar.

13. It has further come on the record that one Shri Ashok Dattatray Gurav made Complaints dated 3rd May 2002 and 15th May 2002 to the Additional Registrar that tenure of office-bearers of the Union has come to an end in February, 1994, however, they are working illegally and, therefore, its President be dismissed by appointing an Administrator and the election be taken. Similar complaints were made by some other unions. The Additional Registrar then served letter dated 30th May 2002/3rd June 2002 upon the Union that functioning of its Executive Council is illegal and unconstitutional.

14. The Union gave reply dated 16 June 2000 stating that no elections have taken place as its Office-bearers were engaged in espousing its demands and the elections are going to take place by the end of June 2002. Advocate Shri Ghatage was appointed as Election Officer to hold the elections and he informed the Deputy Registrar about election programme. He then informed the Deputy registrar by letter dated 29th June 2002 that number of candidates and number of posts were equal, election took place un-opposed and enclosed list of elected candidates. With the letter. The union also informed accordingly, vide letter dated 17th July 2002. In the mean-time, All India Muslim O. B. C. Origination, Maharashtra made a complaint dated 15th July 2002 to the Deputy Registrar that meeting dated 24th May 2002 of Union's General Council and the elections are illegal and, therefore, fresh enquiry be made and elections be taken again.

15. Shri Joshi, Learned Advocate representing the Appellant Union submitted that the Registrar admittedly never objected the Annual Returns sent by the Union, from time to time. The Registrars have to act as a guiding authority and take proper action if there is wilful contravention of any provisions of the Trade Unions Act. Admittedly, Shri Gurav, who is not member of the Union made complaints to the Registrar. However, Shri Gurav has no *locus standi* Members of the Union alone can complaint of irregularities in administration of the Union. In support thereof, he relied on the decision in *D. Muniratham and the Additional Registrar of Trade Unions-I Madras 6, and two others reported in 1997 I LLJ at page 509 (Madras H. C.)*.

16. Shri Pisal, Learned Assistant Government pleader representing the Respondent replied that the fact that no elections were taken as provided under Bye-laws of the Union and, therefore, the letter dated 30th May 2002/3rd June 2002 is legal one.

17. It is held in D. Munirathaam's case that member of Union alone can Complain of irregularities in administration of the Union a person who ceased to be a member of the Union has no *locus standi* to claim cancellation of the registration. In such circumstances, the Registrars ought to have verified regarding *locus standi* of Shri Gurav prior to taking any action, but it is seen that Shri Gurav is silent in his complaints regarding his status as member of the Union or otherwise. However, that does not automatically mean that the Registrar was estopped from taking legal action against the Union. In addition, it is better to decide the controversy on merits rather than on technicalities.

18. Advocate Shri Joshi, then argued that the Registrar cannot intervene in holding of elections. Likewise, other or rival union has no *locus standi* to meddle with affairs of other Union. He relied on the decisions in *Laxmi Machine Works Ltd. Versus Laxmi Machine Worker's Union reported in 1997 (4) LLN at page 686 and Tata Workers Union Versus State of Zarkhand reported in 2002 (95) FLR at page 393*. He added that process of election was already started as per resolution. In meeting dated 24th May 2002 i.e. prior to issuance of first letter dated 30th May 2002/3rd June 2002. The Registrar is contending that no elections have taken place, however, he was well aware of the election programme prior to taking any action. The elections have taken place unopposed. Therefore, now, it cannot be legally accepted that holding of elections is in contravention of the provisions of Trade Unions Act and especially when process of election had already commenced prior to any action by the Registrar.

19. I am respectfully bound by the two decisions relied by Advocate Shri Joshi. Decision of Division Bench of Patana High Court in case of *Bokaro Steel Workers Union Versus State of Bihar reported in 1995 (7) FLR at page 257 (Patana H. C.)* is referred in Tata Workers Union's case. It is observed that the Registrar of the Trade Union has no authority or power to direct the holding of election of the Office bearers of an Union under his own supervision or under supervision of his nominee. Thus the Registrar cannot intervene in the process of holding elections. Consequently, legality of impugned action needs to be considered in the light of such legal proposition.

20. Advocate Shri Joshi then submitted that impugned order is cryptic, without application of mind and predetermined. Section 10 (b) of the Trade Union Act contemplates intentional violence of any of its provisions. The contravention ought to have taken place or occurred after notice. In addition, the same must be wilful or intentional. For that end, he relied on the decisions in *E. C. I. L. Employees Union Versus Deputy Registrar of Trade Unions reported in 2001, II CLR at page 592 (Andra P. H. C.) and Registrar of Trade Union Versus Lake Palace Hotel reported in 1997, I LLN at page 1011 (Rajasthan H. C.)*. He further submitted that the Union has prayed, time and again, for delivering copies of complaints received by the Registrar. Even then no hearing was given and a cryptic order is passed with utter disregard to the Principles of natural justice. He then relied on the decision in *Nagada Rashtra Sevak Karmachari Congress Versus Industrial Court reported in 1997 (77) FLR at page 139*.

21. Assistant Government pleader Shri Pisal, replied that the union violated the constitution, a show cause notice was issued to the Union and then its registration is cancelled. Therefore, an opportunity was given to the Union and order of cancellation is legal one. The Union failed to take elections and has to suffer consequences thereof.

22. Section 10 of the Trade Unions Act empowers the Registrar to cancel Certificate of Registration of the Trade Union in given circumstances. In this Appeal, the Registrar has cancelled the Registration Certificate by invoking powers under sub-section (b) thereof on the ground of violation of Sub-Rules (2) (5) of Rule 22 of its Constitution by the Union.

23. A Division Bench of the Bombay High Court in *Saraswati Co-operative Bank Employees Union Versus State of Maharashtra reported in 1996 (74) FLR at page 1945 (Bom)*, held that in order to invoke the jurisdiction under section 10 (b) of the Act, there must be material before the Registrar that the trade Union should have wilfully contravened any provisions of the Act or any Rule.

24. It is held in Registrar of Trade Unions *Versus* Lake Palace Hotel's (referred above) that registration can be cancelled on the ground of wilfully and "after notice" contravening any provisions of the Trade Union Act. In the present case the process of election has already started and the Registrar had no right to intervene in holding of the election. He was informed accordingly, from time to time, by the Union as well as the Election Officer. Thus, he was well aware of the process of election prior to issuance of first notice. As such, it cannot be accepted that there was wilful or unequivocal contravention of provisions of the Trade Unions Act. In fact, process of election had already been commenced prior to any action by the Registrar and, therefore, it cannot be accepted that the Union has "Wilfully" and "after notice" violated respective rules of its Constitution. It is surprising to note that impugned order is altogether silent as to how there is wilful contravention of provision of the Trade Unions Act and that too "after notice." It appears that the Registrar has passed impugned order without considering the factual as well as legal position and in a mechanical manner. Cancellation of Registration Certificate can be ordered only for intentional violation of any provisions of the Trade Union Act. As such, there must be an element of malice. Process of election had already commenced. The Registrar never objected Annual Returns submitted by the Union, from time to time. In such circumstances, impugned order is unsustainable in law. Accordingly, I answer Point No. 1 in the negative and pass following order :—

Order

- (i) The Appeal is allowed.
- (ii) Impugned order cancelling Registration Certificate of the Appellant Union is quashed and set aside.
- (iii) Parties to bear their own costs.

Kolhapur,
Dated the 20th October 2003.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

V. D. PARDESHI,
Assistant Registrar,
Industrial Court, Kolhapur.

**BEFORE THE INDUSTRIAL COURT, MAHARASHTRA
AT KOLHAPUR**

REVISION APPLICATION (ULP) No. 82 of 2003.—Shri Gopichand Keshav Dhopate A/P. Shirgaon, Tal. Deogad, District Sindhudurg.—*Rev. Applicant.*—*Versus*—Divisional Traffic Superintendent, Maharashtra State Road Transport Corporation, Sindhudurg Division at Kankavali, District Sindhudurg.—*Respondent.*

In the matter of Revision u/s. 44 of the M.R.T.U. and P.U.L.P. Act, 1971.

CORAM.—Shri C. A. Jadhav, Member.

Appearances.—Shri Y. G. Salokhe, Advocates for the Rev. Applicant.

Shri M. G. Badadare, Advocate for the Respondent.

Judgement

This is a revision by original Complainant an employee challenging legality of Judgment and order passed in Complaint (ULP) No. 182/95 by Labour Court. Kolhapur, whereby relief of reinstatement with continuity of service and full back wages is refused by dismissing his complaint.

2. Admittedly, present petitioner (hereinafter referred to as Complainant) was working under present Respondent (hereinafter referred to as Corporation) as a Conductor since many years. He was on duty on 26th July 1993 on Vaibhavwadi- Vijaydurg route. His bus was checked by the checking squad. The squad made a report to higher authorities. The Corporation then served chargesheet dated 4th August 1993 upon him mainly alleging resale or reuse of used tickets and fraud or dishonesty or mis-appropriation. The Complainant denied the charges and then an enquiry took place. The enquiry officer held that all charges levelled against the Complainant are proved. Consequently, the Complainant was dismissed on 4th August 1995.

3. It is case of the Complainant that he did not commit any misconduct, But his spot statement was obtained by force and he was prevented from stating the real facts. Even then, he was chargesheeted. In addition, the enquiry officer has acted as prosecutor *cum*, Judge and cross-examined him in a piercing manner. As such, the enquiry is in violation of principles of natural justice. Likewise, there was no evidence before the enquiry officer to hold him guilty. As such, findings of the enquiry officer are perverse. It is then contended, in the alternate, that punishment of dismissal is shockingly disproportionate and his past record was not considered. Finally, he alleged that the Corporation has engaged in an unfair labour practice and sought requisite reliefs.

4. The Corporation filed its written statement at (Exh. 12) contending that the checking squad found various illegalities. It was found that the Complainant issued tickets sold in the earlier trip and had excess cash. The checking squad recorded statements of the passengers and then the Complainant was chargesheeted. The enquiry is fair and proper and findings of the enquiry officer are well justifiable. Proved misconducts were serious and hence proper punishment of dismissal is awarded. Thus the Corporation justified its action as well as the punishment and finally, prayed for dismissal of the complaint.

5. Considering rival pleadings, Labour Court framed issues at Exh. O-14. The corporation produced entire enquiry papers and Complainant's default card. None of the parties lead oral evidence.

6. Learned Labour Court, on perusal of documentary evidence and hearing both parties firstly held that the enquiry was fair and proper. It is then held that spot statement of the Complainant and statement of the witnesses proves complicity of the accused and accepted findings of the enquiry officer. It then held that proved misconduct is grave and serious and punishment of dismissal would not be disproportionate. Finally, it dismissed the Complaint on 15th July, 2003 . Said decision is challenged in this revision.

7. I heard both Advocates. Considering rival submissions, following points arise for my determination.

- (i) Whether the Labour Court is justified in accepting findings of the enquiry officer ?
- (ii) Whether punishment of dismissal is an unfair labour practice ?
- (iii) What order ?

9. My findings, on above points, are as under :—

- (i) Yes,
- (ii) No,
- (ii) The revision application is dismissed.

Reasons

9. This being revision under section 44 of the M. R. T. U. and P. U. L. P. Act, it is not necessary to scrutinise rival pleadings meticulously. The only material question is whether documents on record are incapable of supporting impugned decision/order. In other words, whether impugned order is perverse or unjustifiable ?

10. Shri Salokhe, Advocate representing the Complainant tried to canvass that passenger Sou. Badambe was unable to read and write and her statement was recorded by another passenger. As such, her version regarding the number of ticket issued to her is untrustworthy. Besides, Complainant's statement was forcibly recorded and he was prevented from stating real facts. But, the enquiry officer has mechanically believed statement of the passengers and the labour Court has mechanically accepted the same.

11. It is an admitted position that statement of the two passengers were recorded in presence of the Complainant. As such, he is now estopped from contending that those were not true versions. In addition, he has admitted entire factual position in his spot statement. The Complainant was found having excess cash and there is no logical explanation for the same. I therefore, find that findings of the enquiry officer are well justifiable and those are rightly accepted by learned Labour Court. Accordingly, I answer point No. 1 in the affirmative.

12. Shri Salokhe in the second phase submitted that there is no similar past misconduct to Complainant's credit in past service of 20 years. As such, punishment of dismissal which is in the nature of economical death is totally unjustifiable. The Corporation ought to have awarded lesser punishment like compulsory retirement or discharge. For that end he relied on decisions of Hon'ble Apex Court *Ramesh Chand Versus Commissioner of Police, Delhi & Ors. reported in 1999 II-CLR at page-692* and *U. P. State Road transport Corporation & Ors. Versus Mahesh Kumar Mishra & Ors. Reported in 2000 II-CLR at page-10*. Finally, he submitted that punishment of dismissal is shockingly disproportionate.

13. Shri Badadare, learned Advocate representing Corporation replied that resale or reuse of used tickets and the dishonesty are not minor or technical misconducts. Corporation's every conductor holds a post of trust and confidence and is the only source of income for the Corporation. There are other 14 misconducts to Complainant's Credit and possess bad service record. He further submitted that proved misconducts cannot be said by stretch of imagination, as minor or technical misconducts. He relied on the decision of Hon'ble Apex Court in *Janata Bazar Versus Secretary reported in 2000 III- CLR at page 568*. Misconduct under item 7 (e) of Corporation's Discipline and Appeal procedure pertains to resale or re-issue of used tickets whereas under item 12 (b) to fraud, dishonesty and misappropriation. As such, proved misconducts cannot be said to be of minor or technical nature. If the bus would not have been checked. The Complainant would have certainly mis-appropriated the fare collected from the passengers. No prudent employer will employ an employee who is guilty of fraud and misappropriation. I am respectfully bound by the 2 decisions of the Hon'ble Apex Court (referred above) by Shri Salokhe. But, it is held in Janata Bazar's case (referred above) that if mis-appropriation is proved may be of small or large amount, there is no question of showing uncalled sympathy and reinstating the employee in service.

14. The Complainant has filed pursis at Exh. U-5 stating that he has crossed the age of superannuation on 28th July, 2002. It is observed in Janata Bazar's case that there is no question of considering past record in case of proved misconduct of misappropriation and the Labour Court cannot substitute penalty imposed by the employer in such case. Considering such dictum and Complainant's bad service record. I am unable to accept that punishment of dismissal is shockingly disproportionate. Accordingly, I answer point No. 2 in the negative and pass following order :—

Order

- (i) The Revision Application is dismissed.
- (ii) Parties shall bear their own costs.

Kolhapur,

Dated the 2nd December 2003.

C. A. JADHAV,

Member,

Industrial Court, Kolhapur.

V. D. PARDESHI,

Assistant Registrar,

Industrial Court, Kolhapur.

**BEFORE THE EMPLOYEE'S INDUSTRIAL COURT
AT KOLHAPUR**

APPLICATION (ESI) No. 14 OF 1991.—Mangal Sizers, A Partnership Firm, Shri Ramnagar, Ichalkaranji.—*Applicant—Versus—*(1) Deputy Regional Director, Employees State Insurance Corporation, P. M. T. Commercial Complex, Nana Shankarshet Road, Swargate, Pune, (2) Regional Director, Employees State Insurance Corporation, P.M.T. Commercial Complex, Nana Shankarshet Road, Swargate, Pune.—*Respondents.*

In the matter of Application under section 77 read with section 75 of the Employees State Insurance Act.

CORAM.—C. A. Jadhav, Judge.

Appearances.—Shri D. S. Joshi and T. B. Vaze, Advocates for the Applicant,
Shri S. V. Kotnis, Advocate for the Respondents.

Judgment

1. This is an application under section 77 read with section 75 of the E.S.I. Act seeking that Respondent No.1's order purported to be passed under section 45-A of the E. S. I. Act, claiming contribution on 'hamali' and 'wood-cutting' charges, is bad in law and to quash and set-aside the same.

2. Admittedly, the applicant is a partnership firm engaged in sizing of cotton yarn. It is covered under the E. S. I. Act *vide* Code No. 33-5993. Insurance Inspector inspected applicant's record on 2nd February 1988. Respondent No.1 then directed to the Applicant by letter dated 4th April 1988 to pay contribution for the period stated therein. Respondent No.1 then issued notice dated 28th May 1990 in Form No. C-18 calling the applicant to pay requisite contribution and granted personal hearing. Applicant's Representative Shri Kulkarni attended personal hearing on 27th June 1990 and made various submissions. Respondent No.1 then passed impugned order on 14th November 1990 under section 45-A of the E. S. I. Act directing the applicant to pay contribution on 'hamali' and 'wood-cutting' charges alongwith interest thereon. Said order is subject matter of this application.

3. It is case of the applicant that bullock-cart owners are independant contractors that work with number of other units. As such, carriage and carting charges paid to them are not wages as defined under the E. S. I. Act but Respondent No. 1 has not considered this material legal aspect. Likewise, the wood-cutters also not its employees on same ground. It is then alleged that the Applicant is not liable to pay requisite contribution. Finally, the applicant has prayed for requisite declaration and other consequential reliefs.

4. The Respondent filed their say at Exh.11 and written Statement at Exh. 10, contending at the outset that the Applicant has not deposited 50% amount claimed as provided under section 75(2B) of the E.S.I. Act and therefore, the Application is liable to be dismissed on this ground itself.

5. It is then contended that the Applicant failed to produce documentary evidence in support of his contention like professional tax/income-tax returns and, therefore, impugned order was passed. In fact, the Applicant paid contribution on wood-cutting charges and it is well indicative of fact that there is contractual relationship between the applicant and the bullockcart owners as well as wood-cutter. In such circumstances, now the applicant is estopped from producing relevant evidence in subsequent judicial proceeding. Finally, the Respondent justified their action and prayed for dismissal of the application.

6. Considering rival pleadings, my learned Predecessor framed issues at Exh.O-12. In my opinion, the factual position regarding bullock-cartmen and wood-cutter was different. I, therefore, re-caste those issues. Now, following issues arise for my determination :—

(i) Whether bullock-cartmen engaged by the Applicant are covered by the definition of 'employee' as defined under section 2(9) of the E.S.I. Act ?

(ii) Whether wood-cutters engaged by the Applicant are covered by the definition of 'employee' as defined under section 2 (9) of the E.S.I. Act ?

(iii) Whether the Applicant is liable to pay contribution as per the order passed under section 45-A of the E.S.I. Act ?

(iv) What order ?

7. My findings on above issues, are as under :—

(i) No.

(ii) Yes.

(iii) Yes, to the extent of wages paid to wood-cutters.

(iv) The application is partly allowed.

Reasons

8. Both parties produced concerned documents and those are not disputed. No oral evidence was led by either of the parties. The Applicant has stated/explained during personal hearing to review the order of imposing contribution and made Submissions that bullock-cart man and wood cutters are independent contractors, are not under his control and supervision and work for many other units.

9. Shri, learned advocate representing the Applicant submitted that bullock-cartowners and the wood-cutters are not under the legal obligation of the Applicant to regularly attend his factory and that too at a specific time. Definition of 'employee' cannot be unduly stretched. The Applicant has no control over them. As such, there is no relationship of employer and employee. He placed reliance on decision of Hon'ble Apex Court in *Dharangdhra Chemical Works Ltd. V/s. State of Saurashtra* and Ors. reported in Supreme Court Labour Judgments 1950-83, Vol.6 at page 597. He also relied upon decision of Andhra Pradesh High Court in *E. I. D. Parry (India) Ltd. V/s. Employees State Insurance Corporation* reported in 2002 II CLR at page 349.

10. Shri Kotnis, learned Advocate representing the Respondents replied that hamals engaged as carriers of goods are covered by the definition of 'employee'. He relied upon decision in (1) *M/s. Rajkamal Transport and Anr. V/s. The Employees State Insurance Corporation* reported in 1996 III LLJ at page 435, (2) *Soft Beverages (P) Ltd. V/s. E. S. I. Corporation, Madras* reported in 2000(87) FLR at page 968 and (3) *E. K. Hajmohammad Meera Sahip and Sons V/s. Regional Directors, ESI Corporation* reported in 2003 I CLR at page 741. He then submitted that facts in EID parry (India) Ltd.'s case are altogether different.

11. The factual position is not seriously disputed by the parties. It is mainly observed in impugned order that the Applicant failed to produce requisite evidence and paid wood-cutting charges, in the past. It was, therefore, held that the Applicant is liable to pay contribution on 'hamali' and 'wood-cutting' charges. Thus, Respondent No. 1 has nowhere considered but rather ignored applicant's paramount plea of supervision and control.

12. I am respectfully bound by various decisions relied by both advocates.

13. In *M/s. Rajkamal Transport and Anr. V/s. The E.S.I. Corporation* (1996 II LLJ at Page 435), it is held that in dealing with 'hamal' engaged as carriers of goods for loading and unloading purposes, the test of payment of salary alone is not relevant consideration but relevant consideration to find out whether work done by employees is in connection with the establishment.

14. Hon'ble Apex Court in *Kirloskar Bns. Ltd. V/s. E.S.I. Corporation* reported in 1996 (72) FLR at page 697 has held that the true test is whether the principal employer had control over the employees.

15. In *E.K.Hajmohammad Meera Sahib & Sons Vs. E.S.I. Corporation* reported in 2003 I CLR at page 471 decision in *Rajkamal Transport V/s E.S.I. Corporation* is relied. It is then held that work of unloading and lorries in which the raw hides and skins are brought, is a work preliminary to the work carried in the factory and the bringing of raw-hides and skins is not one time affair and not an event which is sporadic in nature but a continuous one as without regular supply of raw-material, a factory cannot possibly function.

16. It is held by Hon'ble Apex Court in *Dharangdhra Chemical Works Ltd. V/s. State of Saurashtra* (referred above) that test to determine relationship as master and servant is the existence of the right in the master to supervise and control work done by the servant nor only in the matter of directing what work the servant is to do but also manner in which he shall do his work. In my humble opinion, therefore, the supervision and control is prime test to determine relationship as employer and employee. In the present case, the applicant has no bullocks or bullock-cart of his own. The bullock-cartmen are called as and when needed and paid carting charges/freight as may be settled amicably. As such, the Applicant has no control or supervision on them and they cannot be compelled to work for a fixed period. Simultaneously, they can legally refuse applicant's offer for no reason and can carry goods of any kind of another person. I must also state that it is not the case of the Corporation that same bullock cartmen are exclusively working for the applicant alone and are under supervision and control of the Applicant. It can well be said that judicial notice can be taken of the fact that services of the bullock cartmen could be utilised by several other persons. Decision of Hon'ble Apex Court in *Employees State Insurance Corporation V/s. Premier Clay products reported in 1994 Supp. (3) at page 567* is relied in *EID Parry (I) Ltd.'s* case. In that decision Hon'ble Apex Court has held that where concern hires some coolies for loading and unloading of its goods, and where such coolies are available for work to others also, those coolies cannot be called even casual workers and hence no contribution is payable to the Corporation in respect of such workers. Thus, in my humble opinion, supervision and control as well as responsibility and accountability are the paramount tests to determine relationship as employer and employees. In such circumstances, the ratio in decision in *E.S.I. Corporation V/s. Premier Clay Products* (referred above) *EID Parry (I) Ltd. Vs. ESI Corporation* (referred above) are squarely applicable to the facts of this case. Consequently, the bullock-cartmen cannot be held to be 'employee' of the Applicant. However, case of wood-cutters is totally different. They work within the premises of the Applicant, for the Applicant, are under supervision and control of the Applicant. As such, the wood-cutters are employees of the applicant within the meaning of section 2 (9) of the E.S.I. Act. Accordingly, I answer Point No.1 in the negative and point No.2 in the affirmative.

17. In the backgrounds of above discussions and findings I hold that Corporation's claim to the extent of contribution on hamali charges is unsustainable in law and the applicant is not liable to pay contribution for the same. However, the applicant is liable to pay contribution on payments made to wood-cutters. I answer Point No.3 accordingly.

18. To conclude, I pass the following order :—

Order

(i) The Application is partly allowed.

(ii) It is declared that the Applicant is not liable to pay contribution on 'hamali charges' and Respondent No.1's order dated 14th November 1990 directing the Applicant to pay contribution on 'hamali charges' and Respondent No.1's order dated 14th November 1990 to the extent of directing the applicant to pay contribution of the same, is set-aside.

(iii) The Applicant is directed to pay contribution, interest etc. on wood-cutting charges. Contribution paid in the past, if any, be adjusted from the outstanding amount.

(iv) Parties to bear their own costs.

C. A. JADHAV,

Judge,

Kolhapur,

Dated the 4th December 2003.

Employees Insurance Court, Kolhapur.

V. D. PARDESHI,

Asstt. Registrar,

Industrial Court, Kolhapur.

**BEFORE THE EMPLOYEE'S STATE INDUSTRIAL COURT
AT KOLHAPUR**

APPLICATION (ESI) No. 8 OF 1991.—S. M. Ghatge & Sons Agencies (P) Ltd., 25, Hind Co-Operative Housing Society Ltd., Ruikar Colony, Kolhapur.—*Applicant—Versus—*The Regional Director, E. S. I. Corporation, P. M. T. Commercial Complex, Swargate, Pune.—*Respondent.*

In the matter of Application under section 77 read with Section 75 of the Employees State Insurance Act.

CORAM.—C. A. Jadhav, Judge.

Appearances.—Shri D. S. Joshi, Advocate for the Applicant,
Shri S. V. Kotnis, Advocate for the Respondent.

Judgment

1. This is an application under section 77 read with section 75 of the E.S.I. Act; seeking declaration that the applicant is not liable to pay damages of Rs. 26713 and to cause and set aside respondent's order passed under section 85B of the E. S. I. Act.

2. Admittedly, the applicant is a company register under the Companies Act and deals with sale of electrical equipments, two wheelers etc. It is covered under the E. S. I. Act, *vide* Code No. 33-6362.

3. Respondent No.1 issued letter dated 29th January 1986 to the applicant to pay contribution of Rs.100906.75. The applicant then gave explanation dated 26th March 1986. Much more correspondence took place between the applicant and the Respondent. Finally, Respondent passed an order under section 45-A of the E. S. I. Act on 23rd February 1989, determining the contribution as Rs. 25448.55 and interest thereon of Rs. 2108.39. Said amount was paid by the applicant between the period 23th March 1990 to 29th April 1990. The contribution determined was for the period from July, 1979 to 1983-84.

4. It is also an admitted position that the respondent then served notice dated 29th March 1990 under section 85B of the E. S. I. Act to showcause as to why damages as indicated therein should not be imposed. Then hearing took place on 20th July 1990. Applicant's representative—Accountant Shri Athawale submitted that delay may be reckoned for levying damages from the date on which final decision was communicated to the company. The Respondent then passed impugned order on 14th August 1990, directing the applicant to pay damages of Rs. 26713 for the delayed payment of contribution for the period June, 1979 to March, 1984. Said order is subject matter of this application.

5. It is case of the applicant that it filed an application for review/revision of the order directing to pay damages. However, the same was not entertained at all. In fact due contribution was finally determined on 23rd February 1989 and there was no liability to pay contribution till its determination on 23rd February 1989. But, the Respondent did not consider all such facts and mechanically passed impugned order without application of mind. Finally, applicant has prayed for requisite declaration and consequential reliefs.

6. The Respondent filed his written statement at Exh. 10 consisting of 12 pages elaborately pleading the entire factual position. He contended that the applicant did not pay requisite contribution within time and therefore, Inspectors were required to be deputed from time to time. The applicant was directed on 29th January 1986 to pay requisite contribution and it was finally determined as Rs. 25448.55 interest of Rs. 2108.39 on 23rd February 1989. During the said hearing the applicant knowingly and deliberately evaded to produce bifurcation statement so as to determine the exact contribution. As such, no equity lies in favour of the applicant. In fact, the contribution due was for the period July, 1979 to March, 1984. It ought to have been paid within 21 days as per Rule 31

of Employees' State Insurance (General) Regulations. As such, the applicant is liable to pay the damages. Finally, the Respondent justified its decision and prayed for dismissal of the application.

7. Considering rival pleadings following points arise for my determination :—

(i) Whether impugned order passed under section 85B of the E. S. I. Act, directing to pay damages for the delayed payment of the contribution is legal and proper ?

(ii) What Order ?

8. My findings, on above points are as under :—

(i) Yes.

(ii) The application is dismissed.

Reasons

9. The facts arising out of rival pleadings are no longer in disputes. The applicant was liable to pay contribution to the tune of Rs. 25000 for the period July, 1979 to March, 1984, but the same was not paid by him and it was ultimately quantified by order under section 45A of the E. S. I. Act. Regulation 31 provides that an employer shall pay the contribution within 21 days from the last day of the calendar month in which the contribution falls due. Applicant's explanation that the contribution was not paid as it was not determined does not stand to the reason for the obvious reason that contribution of Rs. 25448.55 alongwith interest was found due from him. If the applicant would have paid the requisite amount within 21 days, as prescribed under Regulation No.31, it was not necessary for the Respondent to pass order under section 45-A of the E. S. I. Act, determining the contribution.

10. Shri Vaze, learned Advocate representing the applicant tried to canvass that the applicant was unable to pay requisite contribution as the same was yet to be determined. I am not impressed by his arguments. The applicant cannot disown his liability to pay within 21 days. He ought to have paid contribution, according to his own calculations within time. It is held by Hon'ble Apex Court in *E.S.I. Corporation V/s. Narnit Pharmaceuticals and chemicals Pvt. Ltd., reported in 1998 (79) FLR-793* that rate of damages under section 85B of the E. S. I. Act should be within ceiling of 100% of amount of arrears of contribution not paid in time. As such, power is vested with the Respondent to levy the damages, Contribution for the period July, 1979 to March, 1984 was over due, when it was admittedly paid in March-April, 1990. As such, the Respondent has rightly levied the damages and there is no element of arbitrariness or victimisation. Accordingly, I answer point No.1 in the affirmative.

11. I must state that the applicant has paid damages of Rs. 26713 on 5th February 1991 under protest. Impugned order is held to be legal and proper. As such, he is not entitled to repayment thereof. Finally, I pass following order :—

Order

(i) The Application is rejected.

(ii) Parties shall bear their own costs.

Kolhapur,
Dated the 9th December 2003.

C. A. JADHAV,
Judge,
Employees Insurance Court, Kolhapur.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

**BEFORE THE EMPLOYEE'S INDUSTRIAL COURT
AT KOLHAPUR**

APPLICATION (ESI) No. 17 OF 1991.—Ravirang Sizers, Ward No.9, H. No.637 (2), Station Road, Ichalkaranji.—*Applicant—Versus—*(1) Dy. Regional Director, Employees' State Insurance Corporation, PMT Commercial Complex, Nana Shankar Sheth Road, Swargate, Pune.—*Opponent No.1*, (2) Regional Director, Employees' State Insurance Corporation, PMT Commercial Complex, Nana Shankar Sheth Road, Swargate, Pune.—*Opponent No. 2*.

In the matter of Application under section 77 of the E. S. I. Act. 1948.

CORAM.—C. A. Jadhav, Judge.

Appearances.—Shri D. S. Joshi, and Shri T. B. Vaze, Advocates for the Applicant,
Shri S. V. Kotnis, Advocate for the Opponents.

Judgment

(Dictated in open Court)

This is an application under section 77 read with section 75 of the E.S.I. Act seeking declaration that Respondent No. 1's order purported to be passed under section 45-A of the E. S. I. Act claiming contribution on 'Hamali charges' is bad in law and to quash and set aside the same.

2. Admittedly, the applicant is a Partnership Firm and is engaged in sizing of cotton yarn. It is covered under the E. S. I. Act *vide* Code No.33-6475-19. Insurance Inspector inspected Applicant's record on 16th February 1989. Respondent No.1 then directed the Applicant by letter dated 27th June 1989 to pay contribution on wages/salary paid to Shri Mahajan as well as on 'Hamali charges' for the respective periods. Respondent No.1 then issued notice dated 23th October 1989 in Form No. C-18 calling the applicant to pay contribution of Rs.4616.71 and granted personal hearing. The Applicant submitted representation dated 20th September 1990 contending that contribution of Rs. 565.50 regarding wages paid to Shri Mahajan is already paid and 'hamali charges' are paid to independent bullock cart owner and no contribution is payable on that amount. Respondent No.1 then passed impugned order under section 45-A of the E. S. I. Act on 15th November 1991 directing the applicant to pay contribution on 'hamali charges' alongwith interest thereof. Said order is subject matter of this application.

3. It is case of the Applicant that bullock cart owner Shri Sayyad is not its employee but independant contractor having licence of concerned authority and works with number of other units. As such, he is not 'employee' under the E.S.I. Act. However, entire legal and factual position is altogether ignored by Respondent No.1 and impugned order is passed mechanically. Finally, the Applicant has prayed for requisite declaration and then to quash and set aside impugned order. The Applicant also filed interim Application Exh. U-2 to stay impugned recovery, till decision of main application.

4. The Respondents filed their say at Exh.11 and written statement at Exh.10, contending at the outset that the applicant has not deposited 50% amount claimed as provided under section 75(2B) of the E. S. I. Act and therefore, the application is liable to be dismissed on this ground itself.

5. It is then contended that the applicant failed to produce documentary evidence in support of his contention like professional tax, income tax returns and, therefore, it was held that there is contractual relationship between the applicant and Shri Sayyad by drawing an adverse inference. In such circumstances, now, the applicant is estopped from producing concerned documents in subsequent judicial proceeding. Finally, the Respondent justified their action and prayed for dismissal of the application.

6. Considering rival pleadings, following points arise for my determination :—

(i) Whether bullock-cartman Shri Sayyad engaged by the Applicant is 'employee' as defined under section 2(j) of the E.S.I. Act ?

(ii) Whether the Applicant is liable to pay the contribution as per order dated 15th November 1991 passed under section 45-A of the E.S.I. Act ?

(iii) What order ?

7. My findings, on above points, are as under :—

(i) No.

(ii) No.

(iii) The Application is allowed.

Reasons

8. Both parties have produced documents on record. On perusal of documents on record, I find that the Applicant has explained by letter dated 20th September 1990 that Shri Sayyad is an independant contractors and works for other many units. It is further stated that Shri Sayyad is not under his control and supervision but is a self employed bullock cart owner.

9. Shri Joshi, learned Advocate representing the Applicant submitted that Shri Sayyad was neither employee of the applicant's nor was under legal obligation to attend applicants factory regularly and that too at a specified time. Definition of 'employee' cannot be unduly stretched. In fact, the applicant has no control over work of loading and unloading done by Shri Sayyad. As such, there is no relationship of employer and employee. He placed reliance on decision of Hon'ble Apex Court in *Dharangadhra Chemical Works Ltd., Vs. State of Saurashtra and Ors. reported in Supreme Court Labour Judgments - 1950-83, Vol. 6 at page 597*. He also relied upon decision of Andhra Pradesh High Court in *E. I. D. Parry (India) Ltd., Vs. Employees State Insurance Corporation reported in 2002 II CLR at page 349*.

10. Shri Kotnis, learned Advocate representing the Respondent replied that hamals engaged as carriers of goods are covered by the definition of 'employee'. He relied upon the decision in (1) *M/s. Rajkamal Transport & Anr. Vs. The Employees State Insurance Corporation reported in 1996 III LLJ at page 435*, (2) *Soft Beverages (P) Ltd. Vs. E.S.I. Corporation, Madras reported in 2000 (87) FLR at page 968* and (3) *E. K. HajMohammad Meera Sahib and Sons Vs. Regional Director, E. S. I. Corporation reported in 2003 I CLR at page 741*. He then submitted that facts in EID Parry (India) Ltd.'s case are altogether different.

11. The factual position is not seriously disputed by the parties. The applicant in his representation dated 20th September 1990 has avered in terms of this application. As such, the Respondents were well aware about his plea. It is mainly observed in impugned order that whosoever engaged for carry out the work of the factory and being paid by virtue of the same, is an 'employee' of the factory, as per provisions of the E.S.I. Act, and attracts contribution on the wages paid to him. Thus, Respondent No.1 has nowhere considered but rather ignored applicant's paramount contention of supervision and control.

12. I am respectfully bound by various decisions relied by both advocates.

13. In *M/s. Rajkamal Transport & Anr. Vs. the Employees State Insurance Corporation (1996 II LLJ at page 435)* is held that in dealing with 'hamales' engaged as carriers of goods for loading and unloading purposes, the test of payment of salary alone is not relevant consideration but relevant consideration is to find out whether work done by employees is in connection with the establishment.

14. Hon'ble Apex Court in *Kirloskar Brs. Ltd., Vs. E.S.I. Corporation reported in 1996 (72) FLR at page 697* has held that the true test is whether the principal employer had control over the employees.

15. In *E. K. Hajmohammad Meera Sabib & Sons Vs. ESI Corporation* (reported in 2003 I CLR at page 741) decision in *Rajkamal Transport Vs. E.S.I. Corporation* (reported in 1996 II LLJ at page 435) is relied. It is then held that work of unloading and lorries in which the raw hides and skins are brought, is a work preliminary to the work carried in the factory and the bringing of raw hides and skins is not one time affair and not an event which is sporadic in nature but a continuous one as without regular supply of raw material a factory cannot possibly function.

16. It is held by Hon'ble Apex Court in *Dharangdhra Chemical Works Ltd., Vs. State of Saurashtra* (referred above) that test to determine relationship as master and servant is the existence of the right in the master to supervise and control the work done by the servant nor only in the matter of directing what work the servant is to do but also manner in which he shall do his work. In my humble opinion, therefore, the supervision and control is prima test to determine relationship as employer and employee. In the present case, the applicant has no bullocks or bullock cart of his own. Shri Sayyad called as and when needed and paid carting charges/freight as may be settled amicably. In addition, the applicant has no control or supervision on him and he cannot compel Shri Sayyad to work for a fixed period. Simultaneously, Shri Sayyad can legally refuse applicant's offer for no reason and can carry goods of any kind of another person. I must also state that it is not case of the Corporation that same bullock cart men are exclusively working for the applicant alone and are under supervision and control of the Applicant. It can well said or judicial notice can be taken of the fact that services of the bullock cartmen could be utilised by several other persons. Decision of Hon'ble Apex Court in *Employees State Insurance Corporation Vs. Premier Clay Products* reported in 1994 Supp; (3) at page 567 is relied in EID Parry (I) Ltd.'s case. In that decision Hon'ble Apex Court has held that where concern hires some coolies for loading and unloading of its goods, and where such coolies are available for work to others also, those coolies cannot be called even 'casual workers' and hence no contribution is payable to the Corporation in respect of such workers. Thus, in my humble opinion, supervision and control as well as responsibility and accountability are the paramount tests to determine relationship as and employer and employee. In such circumstances, the ratio in *decisions in E. S. I. Corporation Vs. Premier Clay Products* (referred above and *EID Parry (I) Ltd. Vs. ESI Corporation* (referred above) are squarely applicable to the facts of this case. Consequently, Shri Sayyad Cannot be held to be applicant's employee. It appears that Respondent No.1 has misconstrued the facts to suit his convenience. The prime test of supervision and control is nowhere considered by him. Accordingly, I answer Point No.1 in the negative.

17. In the background of above observations and findings, I hold that Corporation' claim for contribution on hamali charges is unsustainable in law and the applicant is not liable to pay contribution for the same. Accordingly I answer point No.2 in the negative. It consequently follows that the impugned decision is liable to be set aside by allowing the application.

18. To conclude, I pass following order :—

Order

(i) The Application is allowed.

(ii) It is declared that the Applicant is not liable to pay contribution on 'hamali charges' and Respondent No.1's order dated 15th November 1991 directing the applicant to pay requisite contribution is set-aside.

(iii) Parties shall bear their own costs.

C. A. JADHAV,

Judge,

Employees Insurance Court, Kolhapur.

Kolhapur,

Dated the 19th November 2003.

V. D. PARDESHI,

Asstt. Registrar,

Industrial Court, Kolhapur.

**BEFORE THE EMPLOYEE'S INDUSTRIAL COURT,
AT KOLHAPUR**

APPLICATION (ESI) No. 12 OF 1991.—Nahar Sizing Works, Partnership Firm, Ward No.9, House No.550/A/3, Ichalkaranji—*Applicant—Versus—*1. Dy. Regional Director, Employees, State Insurance Corporation, PMT Commercial Complex, Swargate, Pune.—*Respondent No.1*, 2. Regional Director, Employees, State Insurance Corporation, PMT Commercial Complex, Swargate, Pune.—*Respondent No. 2.*

In the matter of Application under section 77 of the E. S. I. Act.

CORAM.—C. A. Jadhav, M. Judge.

Appearances.—Shri D. S. Joshi and Shri T. B. Vaze, Advocate for the Applicant.,
Shri S. V. Kotnis, Advocate for the Opponents.

Judgment

(Dictated in open Court)

1. This is an application under section 77 read with section 75 of the E.S.I. Act seeking declaration that Respondent No. 1's order purported to be passed under section 45-A of the E. S. I. Act claiming contribution on 'Hamali charges' is bad in law and to quash and set-aside the same.

2. Admittedly, the applicant is a Partnership Firm and is engaged in sizing of cotton yarn. It is covered under the E. S. I. Act *vide* Code No.33-6557. Insurance Inspector inspected Applicant's record on 13th February 1989. Thereafter Respondent No.1 directed the Applicant by letter dated 21th June 1989 to pay contribution of 'Hamali charges' for the period January, 1986 to December, 1988. The Applicant gave reply dated 11th July 1989 explaining that 'Hamali' is paid to independent bullock-cart owners and it is not liable to pay the charges. Respondent No.1 then issued notice in Form No.C-18 dated 2nd July 1990 calling upon the Applicant to pay contribution and granted personal hearing. the Applicant then submitted a detailed representation. On 19th November 1989 reiterating his earlier contention. Opponent No. 1 then passed impugned order under section 45-A of the E. S. I. Act on 30th July 1991 directing the applicant to pay requisite contribution alongwith the interest. Said order is subject matter of this application.

3. It is case of the Applicant that bullock cart owner Shri Dange is not its employee but independent contractor having licence of concerned authority and works with number of other units. As such, he is not 'employee' under the E.S.I. Act. However, entire legal and factual position is altogether ignored by Respondent No.1 and impugned order is passed mechanically. Finally, the Applicant has prayed for requisite declaration and then to quash and set-aside impugned order. The Applicant also filed interim Application Exh. U-2 to stay impugned recovery, till decision of main application.

4. The Respondents filed their say at Exh.12 and written statement at Exh.11, contending at the outset that the applicant has not deposited 50% amount claimed as provided under section 75(2B) of the E. S. I. Act and therefore, the application is liable to be dismissed on this ground itself.

5. It is then contended that the applicant failed to produce documentary evidence in support of his contentions like professional tax, income tax, return of hamal Shri Dange and, therefore, it was held that there is contractual relationship between the applicant and Shri Dange by drawing adverse inference. It is then contended that Shri Dange was paid wages by less than Rs.1600 per month from January, 1986 to December 1988. In such circumstances, now, the applicant is estopped from producing concerned documents in subsequent judicial proceeding. Finally, the Respondents justified their action and prayed for dismissal of the application.

6. Considering rival pleadings, following points arise for my determination :—

(i) Whether bullock-cartman Shri Dange engaged by the Applicant is 'employee' as defined under section 2(j) of the E.S.I. Act ?

(ii) Whether the Applicant is liable to pay the contribution as per order dated 30th July 1991 passed under section 45-A of the E.S.I. Act?

(iii) What order ?

7. My findings, on above points, are as under :—

(i) No.

(ii) No.

(iii) The Application is allowed.

Reasons

8. I must state at the outset that the Applicant has contended that payment made to Shri Dange are not 'wages' as defined under the E.S.I. Act. However, chart thereof shows that Shri Dange is predominantly paid charges of less than Rs.1600 per month. The main controversy is regarding status of Shri Dange.

9. Both parties have produced concerned documents on record. On perusal of documents on produced record, I find that the Applicant has explained by letter dated 2nd March 1990 (Exh.20) that Shri Dange is an independant contractor and works with other number of units. The Applicant then gave explanation dated 19th November 1990 that Shri Dange is not under his control and supervision but is a self employed bullock cart owner.

10. Shri Joshi, learned Advocate representing the Applicant submitted that Shri Dange was neither employee of the applicant nor was under legal obligation to attend Applicant's factory regularly and that too at a specified time. Definition of 'employee' cannot be unduly stretched. In fact, the applicant has no control over work of loading and unloading done by Shri Dange. As such, there is no relationship of employer and employee. He placed reliance on decision of Hon'ble Apex Court in *Dharangadhra Chemical Works Ltd. Vs. State of Saurashtra and Ors. reported in Supreme Court Labour Judgments - 1950-83, Vol. 6 at page 597*. He also relied upon decision of Andhra Pradesh High Court in *E. I. D. Parry (India) Ltd. Vs. Employees State Insurance Corporation reported in 2002 II CLR at page 349*.

11. Shri Kotnis, learned Advocate representing the Respondent replied that hamals engaged as carriers of goods are covered by the definition of 'employee'. He relied upon the decision in 1) *M/s. Rajkamal Transport & Anr. Vs. The Employees State Insurance Corporation* reported in 1996 III LLJ at page 435, (2) *Soft Beverages (P) Ltd. Vs. E.S.I. Corporation, Madras* reported in 2000 (87) FLR at page 968 and (3) *E. K. Haj Mohammad Meera Sahib and Sons Vs. Regional Director, E.S.I. Corporation reported in 2003 I CLR at page 741*. He then submitted that facts in EID Parry (India) Ltd.'s case are altogether different.

12. The factual position is not seriously disputed by the parties. The applicant in his representation dated 19th November 1990 has avered in terms of this application. As such, the Respondents were well aware about his plea. It is mainly observed in impugned order that whosoever engaged for carry out the work of the factory and being paid by virtue of the same, is an 'employee' of the factory, as per provisions of the E.S.I. Act, and attracts contribution on the wages paid to him. Thus, Respondent No.1 has nowhere considered but rather ignored applicant's paramount contention of supervision and control.

13. I am respectfully bound by various decisions relied by both advocates.

14. In *M/s. Rajkamal Transport & Anr. Vs. the Employees State Insurance Corporation* (1996 II LLJ at page 435) it is held that in dealing with 'hamales' engaged as carriers of goods for loading and unloading purposes, the test of payment of salary alone is not relevant consideration but relevant consideration is to find out whether work done by employees is in connection with the establishment.

15. Hon'ble Apex Court in *Kirloskar Brs. Ltd. Vs. E.S.I. Corporation reported in 1996 (72) FLR at page 697* has held that the true test is whether the principal employer had control over the employees.

16. In *E. K. Hajmohammad Meera Sabib & Sons Vs. ESI Corporation (reported in 2003 I CLR at page 741)* decision in *Rajkamal Transport Vs. E.S.I. Corporation* (reported in 1996 II LLJ at page 435) is relied. It is then held that work of unloading and lorries in which the raw hides and skins are brought, is a work preliminary to the work carried in the factory and the bringing of raw hides and skins is not one time affair and not an event which is sporadic in nature but a continuous one as without regular supply of raw material a factory cannot possibly function.

17. It is held by Hon'ble Apex Court in *Dharangdhra Chemical Works Ltd. Vs. State of Saurashtra* (referred above) that test to determine relationship as master and servant is the existance of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also manner in which he shall do his work. In my humble opinion, therefore, the supervision and control is prima test to determine relationship as employer and employee. In the present case, the applicant has no bullocks or bullock cart of his own. Shri Dange called as and when needed and paid carting charges/freight as may be settled amicably. In addition, the applicant has no control or supervision on him and he cannot compel Shri Dange to work for a fixed period. Simultaneously, Shri Dange can legally refuse applicant's offer for no reason and can carry goods of any kind of another person. I must also state that it is not case of the Corporation that same bullock cart men are exclusively working for the applicant alone and are under supervision and control of the Applicant. It can well said or judicial notice can be taken of the fact that services of the bullock cart men could be utilised by several other persons. Decision of Hon'ble Apex Court in *Employees State Insurance Corporation Vs. Premier Clay Products reported in 1994 Supp; (3) at page 567* is relied in EID Parry (I) Ltd.'s case. In that decision Hon'ble Apex Court has held that where concern hires some coolies for loading and unloading of its goods, and where such coolies are available for work to others also, those coolies cannot be called even 'casual workers' and hence no contribution is payable to the Corporation in respect of such workers. Thus, in my humble opinion, supervision and control as well as responsibility and accountability are the paramount tests to determine relationship as and employer and employee. In such circumstances, the ratio in decisions in *E. S. I. Corporation Vs. Premier Clay Products* (referred above and *EID Parry (I) Ltd. Vs. ESI Corporation* (referred above) are squarely applicable to the facts of this case. Consequently, Shri Dange Cannot be held to be applicant's employee. It appears that Respondent No.1 has misconstrued the facts to suit his convenience. The prima test of supervision and control is no-where considered by him. Accordingly, I answer Point No.1 in the negative.

18. In the background of above observations and findings, I hold that Corporation's claim for contribution on hamali charges is unsustainable in law and the applicant is not liable to pay contribution for the same. Accordingly I answer point No.2 in the negative. It consequently follows that the impugned decision is liable to be set-side by allowing the application.

19. To conclude, I pass following order :—

Order

(i) The Application is allowed.

(ii) It is declared that the Applicant is not liable to pay contribution on 'hamali charges' and Respondent No.1's order dated 30th July, 1991 directing the applicant to pay requisite contribution is set-aside.

(iii) Parties shall bear their own costs.

Kolhapur,

Dated the 15th November 2003.

C. A. JADHAV,
Judge,

Employees Insurance Court, Kolhapur.

V. D. PARDESHI
Asstt. Registrar,
Industrial Court, Kolhapur.

**BEFORE THE EMPLOYEE'S INSURANCE COURT,
AT KOLHAPUR**

APPLICATION (ESI) No. 11 OF 1991.—1. Pandharinath Sizing Works, A partnership firm, Ward No.10, 1254/2, Shriramnagar, Ichalkaranji—*Applicant—Versus—*1. Deputy Regional Director, Employees, State Insurance Corporation, PMT Commercial Complex, Nana Shankarshet Road, Pune., 2. Regional Director, Employees, State Insurance Corporation, PMT Commercial Complex, Nana Shankarsheth Road, Swargate, Pune.—*Respondents*.

In the matter of Application under section 77 of the E. S. I. Act.

CORAM.—C. A. Jadhav, Judge.

Appearances.—Shri D. S. Joshi, and Shri T. B. Vaze, Advocates for the Applicant.

Shri S. V. Kotnis, Advocate for the Respondents.

Judgment

(Dictated in open Court)

1. This is an application under section 77 read with section 75 of the E.S.I. Act seeking declaration that Respondent No. 1's order purported to be passed under section 45-A of the E. S. I. Act claiming contribution on 'Hamali' and 'wood-cutting charges' is bad in law and to quash and set-aside the same.

2. Admittedly, the applicant is a Partnership Firm engaged in sizing of cotton yarn. It is covered under the E. S. I. Act *vide* Code No.33-6449. Insurance Inspector inspected Applicant's record on 27th November 1989. Respondent No.1 then directed by the Applicant by letter dated 23th October 1989 to pay contribution for the period stated therein. The Applicant gave reply dated 15th November 1989 explaining that no contribution is legally paid on 'Hamali' and 'wood-cutting' charges. Respondent No.1 then issued notice dated 20th May 1991 in Form No.C-18 calling the applicant to pay requisite contribution and granted personal hearing. The Applicant submitted representation dated 5th June 1991 reiterating his earlier contentions. Respondent No.1 then passed impugned order on 1st July 1991 under section 45-A of the E. S. I. Act directing the applicant to pay contribution on 'hamali' and 'wood-cutting' charges alongwith interest thereon. Said order is subject matter of this application.

3. It is case of the Applicant that bullock cartowners are independant contractors that work with number of other units. As such, carriage and carting charges paid to them are not wages as defined under the E.S.I. Act. but Respondent No.1 has not considered this material legal aspect. Likewise, the wood-cutters also not its employees on same ground. It is then alleged that the Applicant is not liable to pay requisite contribution. Finally, the applicant has prayed for requisite declaration and other consequential reliefs.

4. The Respondents filed their say at Exh.11 and written statement at Exh.10, contending at the outset that the applicant has not deposited 50% amount claimed as provided under section 75(2B) of the E. S. I. Act and therefore, the Application is liable to be dismissed on this ground itself.

5. It is then contended that the applicant failed to produce documentary evidence in support of his contention like professional tax, income-tax, returns and, therefore, impugned order was passed. In fact, the Applicant paid contribution on wood-cutting charges and it is well indicative of fact that there is contractual relationship between the applicant and the bullock-cartowners as well as wood-cutter. In such circumstances, now, the applicant is estopped from producing relevant evidence in subsequent judicial proceeding. Finally, the Respondent justified their action and prayed for dismissal of the application.

6. Considering rival submission, following points arise for my determination :—

(i) Whether bullock-cartmen engaged by the Applicant are covered by the definition of 'employee' as defined under section 2(9) of the E.S.I. Act ?

(ii) Whether wood-cutters engaged by the Applicant are covered by the definition of 'employee' as defined under section 2(9) of the E.S.I. Act?

(iii) Whether the Applicant is liable to pay contribution as per the order passed under section 45-A of the E.S.I. Act?

(iv) What order ?

7. My findings, on above points, are as under :—

- (i) No.
- (ii) Yes.
- (iii) Yes, to the extent of wages paid to wood-cutters.
- (iv) The Application is partly allowed.

Reasons

8. Both parties produced concerned documents and those are not disputed. No oral evidence was led by either of the parties. The Applicant has stated/explained in letter dated 15th November 1989 and representation dated 5th June 1991 that bullock-cartmen and wood-cutters are independent contractors, are not under his control and supervision and work for many other units.

9. Shri Joshi, learned Advocate representing the Applicant submitted that bullock-cart owners and the wood-cutters are not under the legal obligation of the applicant to regularly attend his factory and that too at a specific time. Definition of 'employee' cannot be unduly stretched. The applicant has no control over them. As such, there is no relationship of employer and employee. He placed reliance on decision of Hon'ble Apex Court in *Dharangadhra Chemical Works Ltd. Vs. State of Saurashtra and Ors. reported in Supreme Court Labour Judgments - 1950-83, Vol. 6 at page 597*. He also relied upon decision of Andhra Pradesh High Court in *E. I. D. Parry (India) Ltd., Vs. Employees State Insurance Corporation reported in 2002 II CLR at page 349*.

10. Shri Kotnis, learned Advocate representing the Respondent replied that hamals engaged as carriers of goods are covered by the definition of 'employee'. He relied upon the decision in (1) *M/s. Rajkamal Transport & Anr. Vs. The Employees State Insurance Corporation reported in 1996 III LLJ at page 435*, (2) *Soft Beverages (P) Ltd. Vs. E.S.I. Corporation, Madras reported in 2000 (87) FLR at page 968* and (3) *E. K. Haj Mohammad Meera Sahib and Sons Vs. Regional Director, E. S. I. Corporation reported in 2003 I CLR at page 741*. He then submitted that facts in *E.I.D. Parry (India) Ltd.*'s case are altogether different.

11. The factual position is not seriously disputed by the parties. It is mainly observed in impugned order that the Applicant failed to produce requisite evidence and paid wood-cutting charges, in the past. It was, therefore held that the Applicant is liable to pay contribution on 'hamali' and wood-cutting charges. Thus, Respondent No.1 has no-where considered but rather ignored applicant's paramount plea of supervision and control.

12. I am respectfully bound by various decisions relied by both advocates.

13. In *M/s. Rajkamal Transport and Anr. Vs. The Employees State Insurance Corporation (1996 II LLJ at page 435)* it is held that in dealing with 'hamalis' engaged as carriers of goods for loading and unloading purposes, the test of payment of salary alone is not relevant consideration but relevant consideration is to find out whether work done by employees is in connection with the establishment.

14. Hon'ble Apex Court in *Kirloskar Brs. Ltd. Vs. E.S.I. Corporation reported in 1996 (72) FLR at page 697* has held that the true test is whether the principal employer had control over the employees.

15. In *E. K. Hajmohammad Meera Sahib & Sons Vs. E.S.I. Corporation (reported in 2003 I CLR at page 741)* decision in *Rajkamal Transport Vs. E.S.I. Corporation* is relied. It is then held that work of unloading and lorries in which the raw hides and skins are brought, is a work preliminary to the work carried in the factory and the bringing of raw hides and skins is not one time affair and not an event which is sporadic in nature but a continuous one as without regular supply of raw material, a factory cannot possibly function.

16. It is held by Hon'ble Apex Court in *Dharangadhra Chemical Works Ltd. Vs. State of Saurashtra* (referred above) that test to determine relationship as master and servant is the existence of the right in the master to supervise and control the work done by the servant nor only in the matter of directing what work the servant is to do but also manner in which he shall do his work. In my humble opinion, therefore, the supervision and control is prima test to determine

relationship as employer and employee. In the present case, the applicant has no bullocks or bullock cart of his own. The Bullock-cartmen are called as and when needed and paid carting charges/freight as may be settled amicably. As such, the applicant has no control or supervision on them and they cannot be compelled to work for a fixed period. Simultaneously, they can legally refuse applicant's offer for no reason and can carry goods of any kind of another person. I must also state it is not case of the Corporation that same bullock cartmen are exclusively working for the Applicant alone and are under supervision and control of the Applicant. It can well said or judicial notice can be taken of the fact that services of the bullock cart men could be utilised by several other persons. Decision of Hon'ble Apex Court in *Employees State Insurance Corporation Vs. Premier Clay Products reported in 1994 Supp; (3) at page 567* is relied in EID Parry (I) Ltd.'s case. In that decision Hon'ble Apex Court has held that where concern hires some coolies for loading and unloading of its goods, and where such coolies are available for work to others also, those coolies cannot be called even 'casual workers' and hence no contribution is payable to the Corporation in respect of such workers. Thus, in my bumble opinion, supervision and control as well as responsibility and accountability are the paramount tests to determine relationship as employer and employees. In such circumstances, the ratio in decisions in *E. S. I. Corporation Vs. Premier Clay Products* (referred above) and *EID Parry (I) Ltd. Vs. ESI Corporation* (referred above) are squarely applicable to the facts of this case. Consequently, the bullock-cartmen Cannot be held to be 'employee' of the Applicant. However, case of wood-cutters is totally convert. They work within the premises of the Applicant, for the Applicant are under supervision and control of the Applicant. As such, the wood-cutters are employees of the Applicant within the meaning of section 2 (9) of the E.S.I. Act. Accordingly, I answer Point No.1 in the negative and point No. 2 in the affirmative.

17. In the background of above discussions and findings, I hold that Corporation' claim to the extent of contribution on hamali charge is unsustainable in law and the applicant is not liable to pay contribution for the same. However, the applicant is liable to pay contribution on payments made to wood-cutters. I answer Point No.3 accordingly.

18. To conclude, I pass following order :—

Order

(i) The Application is partly allowed.

(ii) It is declared that the Applicant is not liable to pay contribution on 'hamali charges' and Respondent No.1's order dated 1st July 1991 directing the Applicant to pay contribution on 'hamali charges' and Respondent No.1's order date 1st July 1991 to the extent of directing the Applicant to pay contribution of the same, is set-aside.

(iii) The Applicant is directed to pay contribution, interest etc. on 'wood cutting charges'. Contribution paid in the past, if any, be adjusted from the outstanding amount.

(iv) Parties to bear their own covsts.

(Sd.) C. A. JADHAV,

Judge,

Kolhapur,

Dated the 4th December 2003.

Employees Insurance Court, Kolhapur.

V. D. PARDESHI,

Asstt. Registrar,

Industrial Court, Kolhapur.

**BEFORE THE MEMBER INDUSTRIAL COURT, MAHARASHTRA
AT KOLHAPUR**

REVISION (ULP) No. 105 OF 2000.—Sub-Divisional Engineer, Minor Irrigation, Sub-Division (E.G.S.), Atpadi, Dist. Sangli.—*Revision Applicant—Versus—*Shri Shankar Mahadev Satpute R/o. Pujarwadi, Post-Diganchi, Tal : Atpadi, Dist. Sangli—*Respondent*.

In the matter of Revision under section 44 of the MRTU and PULP Act, 1971.

CORAM.—C. A. Jadhav, Member.

Appearances.—Shri D. J. Mangsule, Asstt. Government Pleader for Revision Applicant.
Respondent in person.

Judgment

1. This is a revision by original Respondent Sub-Divisional Engineer of Minor Irrigation Department, challenging legality of order passed below Exh.U-2 in Complaint (ULP) No. 216/90 by Labour Court, Sangli, whereby delay in late filing of complaint under the MRTU and PULP Act is condoned.

2. Admittedly, present Respondent (herein after referred to as Complainant) was in employment of the present Petitioner (herein after referred to as Sub-Divisional Engineer) as a muster assistant. His services were terminated *w.e.f.* 1st December 1988. He filed above complaint on 14th May 1990, alleging unfair labour practice under section 28(1) read with items 1 (a), (b), (d) and (f) of Sch. IV of the MRTU and PULP Act. He also filed an application (Exh.U-2) under Proviso to section 28 (1) of the MRTU and PULP Act for condoning delay in late filing of the complaint.

3. It is contended in the application for condonation of delay that the Complainant was waiting for commencement of work, so as to get reappointment and, therefore, did not file main complaint within 90 days. It is then contended that therefore, there are good and sufficient reasons for late filing of the complaint.

4. The Sub-Divisional Engineer filed his affidavit (Exh.C-9) contending that reasons put forth for condonation of delay are insufficient and false as well. He also contended that now no work is available which can be provided to the Complainant.

5. Learned Labour Court, on perusal of affidavits of both parties and hearing their representatives, held that there were good and sufficient reasons for late filing of the complaint and condoned the delay *vide* order dated 18th July 2000. Said order is challenged in this revision.

6. Now following points arise for my determination :—

(i) Whether impugned order condoning delay in late filing of the main complaint, warrants interference ?

(ii) What Order ?

7. My findings, on above points, are as under :—

(i) No.

(ii) The Revision Application is dismissed.

Reasons

8. This being a revision under section 44 f the MRTU and PULP Act, it is not necessary to scrutinise rival pleadings meticulously. The only material question is whether document on record are incapable of supporting impugned decision/order. In other words, whether impugned order is perverse or unjustifiable ?

9. Shri Mangsule, learned A. G. P. representing the Sub-Divisional Engineer argued that the Labour Court did not permit Complainant's cross examination and extended misplaced sympathy to him. In fact, the Complainant was discontinued for went of work and no juniors to him were retained. As such, impugned order is unsustainable in law. According to the Complainant, he is terminated on 1st December 1988, He ought to have filed main complaint within 90 days from such date. The main complaint is filed on 14th May 1990. Thus there is delay of about 14 months. The same cannot be said to be inordinate one.

Generally, an employee does not immediately rushes to the Court against his employer, as he has to work under same employer by keeping harmonious relations. As such, Complainant's explanation that he was waiting to get reappointment is well justifiable. It is settled law that Court should not be hyper technical but, a liberal approach has to be taken while condoning delay. Substantial justice deserves to be preferred as against the technical considerations. The Complainant cannot be said to be negligent and the delay cannot be said to be *malafide* one. Learned Labour Court, therefore, has rightly condoned the delay. It has also observed and that too rightly, that the Complainant is not entitled to back wages for the period 1st March 1989 to 13th May 1990. As such, no interference is warranted. Accordingly, I answer point No.1 in the negative.

10. I must also add that original complaint is of the year 1990 and pretry old. Therefore, the Labour Court is directed to decide the main complaint expeditiously. Finally, I pass following order :—

Order

- (i) The revision application is dismissed.
- (ii) R. & P. be sent to Labour Court, Sangli.
- (iii) The Labour Court is directed to decide main complaint expeditiously.
- (iv) No order as to costs.

Kolhapur,

Dated the 10th December 2003.

(Sd.) C. A. JADHAV,

Member,

Industrial Court, Kolhapur.

V. D. PARDESHI

Asstt. Registrar,

Industrial Court, Kolhapur.

**BEFORE THE EMPLOYEE'S INSURANCE COURT,
AT KOLHAPUR**

APPLICATION (ESI) No. 10 OF 1991.—(1) New India Sizers, A Partnership Firm, 9/639/9/K/IA, Bhone Mal, Ichalkaranji—*Applicant—Versus—*(1) Deputy Regional Director, Employees' State Insurance Corporation, PMT Commercial Complex, Nana Shankarshet Road, Pune.,—*Opponent No.1* (2) Regional Director, Employees' State Insurance Corporation, Pune.—*Opponent No.2.*

In the matter of Application under section 77 of the E. S. I. Act.

CORAM.—C. A. Jadhav, Judge.

Appearances.—Shri D. S. Joshi, and Shri T. B. Vaze, Advocate for the Applicant.

Shri S. V. Kotnis, Advocate for the Opponents Nos. 1 and 2.

Judgment

1. This is an application under section 77 read with section 75 of the E.S.I. Act seeking declaration that Respondent No. 1's order purported to be passed under section 45-A of the E. S. I. Act claiming contribution on 'Hamali' charges is bad in law and to quash and set aside the same.

2. Admittedly, the Applicant is a Partnership Firm doing business of sizing of cotton yarn. It is covered under the E. S. I. Act *vide* Code No.33-6404. Insurance Inspector inspected Applicant's record on 27th November 1989. There after, Respondent No.1 directed the Applicant by letter dated 6th July 1990 to pay contribution of 'Hamali' charges for the period November, 1987 to November 1989. Respondent No.1 then issued notice in Form No. C-18 dated 18th March 1991 calling upon the Applicant to pay contribution and granted personal hearing. The Applicant attended personal hearing and submitted a detailed representation regarding its case. Opponent No.1 then passed impugned order under section 45-A of the E. S. I. Act on 21st June 1989 directing the Applicant to pay requisite contribution alongwith interest. Said order is challenged in this Application.

3. It is case of the Applicant that bullockcart owners are not its employees but are independent contractors having licence of concerned authority and works with number of other units. As such, carriage and carting charges paid to them are not wages as defined under the E.S.I. Act. In addition, they are not covered by the definition of an 'employee' as are paid the charges of more than Rs.1600 per month. However, Respondent No.1 has ignored entire factual as well as legal position and has mechanically passed impugned order. Finally, the Applicant has prayed for requisite declaration and to quash and set-aside impugned order and other consequential reliefs.

4. The Respondents filed their say at Exh.11 contending at the outset that the Applicant has not deposited 50% amount of the amount claimed as provided under section 75(2B) of the E. S. I. Act and therefore, the Application is liable to be dismissed on this count itself.

5. It is then contended that the applicant neither replied Corporation's letter dated 6th July 1990 nor furnished information and the documents called for, the Applicant simply submitted a list showing the payment of 'Hamali' charges but did not produce supporting details or vouchers. Eventually, adverse inference was drawn against the Applicant. It is further contended that the Applicant failed to produce necessary documents and licences of the bullockcart owners to show that bullock-cart owners were independent contractors and working with other units as well. Additional grounds are now raised in the application which were never raised during the personal hearing. As such, the Applicant is estopped from raising additional pleas. It is then submitted that the Applicant has even failed to lead secondary evidence like details of income-tax deducted at source while paying the charges to bullock-cart owners and, therefore, it cannot be accepted that they are outsiders or independent contractors. Consequently, reasoned order came to be passed which is legal and justifiable. Finally, the Respondents justified their action and prayed for dismissal of interim as well as main application.

6. Considering rival pleadings, following points arise for my determination :—

(i) Whether bullock-cart-man engaged by the Applicant are covered within the definition of 'employee' as defined under section 2(9) of the E.S.I. Act ?

(ii) Whether payments made to bullockcart men are 'wages' as defined under section 2(22) of the E.S.I. Act?

(iii) Whether the Applicant is liable to pay the contribution as per order dated 1st July, 1991 passed under section 45-A of the E.S.I. Act?

(iv) What order ?

7. My findings, on above points, are as under :—

(i) No.

(ii) Does not survive.

(iii) No.

(iv) The Application is allowed.

Reasons

8. The Applicant has produced Inspection Report dated 6th July 1989 (Exh.13), notice of hearing in Form C-18 (Exh.14) representation dated 1st April 1991 along chart of 'Hamali' (Exh.15) and impugned order alongwith its covering letter (Exh.15) No order evidence is adduced by the Applicant.

9. The Respondents have produced same documents at Exh.17 to 24. No evidence was led by the Respondents as well.

10. Shri Joshi, learned Advocate representing the Applicant submitted that process of preparing cloth consists of four stages *i.e.* spinning, sizing, weaving and processing. The Applicant is engaged in simply signing the yarn. The yarn is starched. Independent bullock-cart owners are engaged as and when needed to deliver the beams for weaving. They are independent contractors having their own bullock cart. As such, the Applicant has neither control nor supervision on them. Besides, they are not under legal obligation to attend applicant's factory regularly and that too at a specified time. In addition, they are not paid wages but carriage and carting charges. In such circumstances, definition of 'employee' cannot be unduly stretched to cover them within the definition. He then submitted that chart produced before Respondent No.1 predominantly shows that all of them are paid amounts of more than Rs.1600 per month and, therefore, are not covered by the definition of 'employee', in any case. Respondent No.1 Corporation is unwilling to extend insurance benefits to them. He further submitted that the Applicant has no control over loading and un-loading done by the bullock-cartmen. He relied on decision of Hon'ble Apex Court in *C. E. S. C. Ltd. Vs. Subhash C. Bose reported in 1992 I CLR at page 932.* and of Hon'ble Andhra Pradesh High Court in *E. I. D. Parry (India) Ltd. Vijayawada Vs. Employees State Insurance Corporation reported in 2002 II CLR at page 349.*

11. Shri Kotnis, learned Advocate representing the Respondents countered above arguments and replied that there are no pleadings in the application that concerned bullock-cart-men are paid amounts of more than Rs.1600 per month and are not under supervision of the Applicant. As such, said plea cannot be taken nor can be entertained. For that end, he placed reliance upon decision in *Kunwar-Prasad Vs. Creative Garments and Another reported in 2001 I LLR at page 617 (Bom. H. C.).*

12. Shri Kotnis then submitted that hamals engaged as carriers of goods are covered by the definition of 'employee'. He relied upon the decision in (1) *M/s. Rajkamal Transport & Anr. Vs. The Employee's State Insurance Corporation reported in 1996 III LLJ at page 435*, (2) *Soft Beverages (P) Ltd. Vs. E.S.I. Corporation, Madras reported in 2000 (87) FLR at page 968* and (3) *E. K. Haj Mohammad Meera Sahib and Sons Vs. Regional Director, Employees' State Insurance Corporation reported in 2003 I CLR at page 741.* He further pointed out that decision relied by other side is referred in *Soft Beverages (P) Ltd. Vs. E. S. I. Corporation.*

13. Advocate Shri Kotnis further canvassed that there is nothing on record to show that bullock-cart men are independant contractors and facts in E. I. D. Parry (India) Ltd. Vs. E. S. I. Corporation are totally different. In that case, the appellant had no control or supervision on the hamalis and the godown keeper would be immediate employer whereas owner of the goods to be the principal employer. Finally, he submitted that impugned order is legal as well as justifiable.

14. The factual position is not seriously disputed by the parties. The Applicant in his written representation dated 5th June 1991 made to Respondent No.1 has explained that bullock-cart owners are self employed, independant contracts and are paid carriage and carting charges. In addition, a chart of 'hamali' was already submitted in response to notice dated 18th March 1991. The same is not disputed by Respondent No.1. Thus, Respondent No.1 was well aware of entire factual position. Advocate Shri Joshi rightly submitted that the law need not be pleaded when the facts are already on record. In my judgment, therefore, pleadings in main application become secondary as the Respondents are nowhere prejudiced. It also cannot be ignored that both parties have not led oral evidence but have relied upon documents only.

15. I am respectfully bound by various decisions relied by both advocates.

16. In *C.E.S.C.Ltd. Vs. Subhash Chandra Bose reported in 1992 I CLR at page 932*, it is held on the facts of that particular case that if the work by the employee was conducted under the direct supervision of the principal employer, he would be an employee under the Act. In that case, it was held that direct supervision and control by the principal employer was held to be one of the determinative facts to decide about the liability to pay contribution under the ESI Act.

17. In *M/s. Rajkamal Transport & Anr. Vs. The Employees State Insurance Corporation (1996 II LLJ at page 435)* it is held that in dealing with 'hamalis' engaged as carriers of goods for loading and unloading purposes, the test of payment of salary alone is not relevant consideration but relevant consideration is to find out whether work done by employees is in connection with the establishment.

18. Hon'ble Apex Court in *Kirloskar Brs. Ltd. Vs. E.S.I. Corporation reported in 1996 (72) FLR at page 697* has held that the true test is whether the principal employer had control over the employees.

19. In *E. K. Hajmohammad Meera Sabib & Sons Vs. E.S.I. Corporation (reported in 2003 I CLR at page 741)* decision in *Rajkamal Transport Vs. E.S.I. Corporation (reported in 1996 II LLJ at page 435)* is relied. It is then held that work of unloading and lorries in which the raw hides and skins are brought, is a work preliminary to the work carried in the factory and the bringing of raw hides and skins is not one time affair and not an event which is sporadic in nature but a continuous one as without regular supply of raw material a factory cannot possibly function.

20. In the present case, the Applicant has no bullocks or bullock-carts of his own. The bullock-cart-men are called as and when needed and paid carting charges/freight as may be settled between the applicant and them. Thus, the freight is not fixed and depends upon load and distance. In addition, the applicant has no direct supervision or control upon them and he cannot compel them to work for a fixed period. Supervision and control is the prime tests determine relationship as an employer and employee. Simultaneously, the bullock-cart-men can refuse applicant's offer for no reason and can carry goods of any kind of any other person. As such, their work is not of a permanent nature but is for a short span of time. I must also state that it is not case of the Corporation that same bullock-cart men are exclusively working for the applicant alone and are under supervision and control of the Applicant. It can well said or judicial notice can be taken of the fact that services of the bullock cart men could be utilised by several other persons. Decision of Hon'ble Apex Court in *Employees State Insurance Corporation Vs. Premier Clay Products reported in 1994 Supp. (3) SCC at page 567* is relied in *EID Parry (I) Ltd.s case*. In that decision Hon'ble Apex Court has held that where concern hires some coolies for loading and unloading of its goods, and where such coolies are available for work to others also, those coolies cannot be called even 'casual workers' and hence no contribution is payable to the Corporation in respect of

such workers. Thus, in my humble opinion, supervision and control as well as responsibility and accountability are the paramount tests to determine relationship as an employer and employee. It is not case of the Corporation that bullock-cartmen are exclusively engaged by the applicant. On the contrary, the applicant has clearly stated in the representation dated 5th June 1991 that bullock-cartment do work of other units. In such circumstances, the ratio in decisions in E. S. I. Corporation Vs. Premier Clay Products (referred above) and E. I. D. Parry (I) Ltd. V/s. E.S.I. Corporation (referred above) are squarely applicable to the facts of this case. Consequently, the bullock-cartmen cannot be said to be covered by the definition of 'employee' as defined under section 2(9) of the E.S.I. Act. It appears that Respondent No.1 has misconstrued the facts to suit his convenience. The prims test of supervision and control is no-where considered by him. Accordingly, I answer point No.1 in the negative.

21. The question as to whether payments made to the bullock-cartmen are wages does not survive as they are not covered by the definition of 'employee' Consequently, point No.2 does not survive for consideration. I answer the same accordingly.

22. In the background of above observations and findings, I hold that Corporation's claim for contribution on hamali charges is unsustainable in law and the applicant is not liable to pay contribution for the same. Accordingly, I answer Point No.3 in the negative. It consequently follows that impugned decision is liable to be set-aside by allowing the application.

18. To conclude, I pass following order :—

Order

(i) The Application is allowed.

(ii) It is declared that the Applicant is not liable to pay contribution on 'hamali charges' and Respondent No.1's order dated 21st June 1989 directing the applicant to pay requisite contribution is set-aside.

(iii) Parties shall bear their own costs.

C. A. JADHAV,

Judge,

Kolhapur,

Dated the 11th November 2003.

Employees Insurance Court, at Kolhapur.

V. D. PARDESHI

Asstt. Registrar,

Industrial Court, Kolhapur.

IN THE INDUSTRIAL COURT, MAHARASHTRA, AT MUMBAI

BEFORE MR. P. K. CHAVARE, PRESIDENT

REVISION APPLICATION (ULP) No. 93 of 2003. —*IN*—COMPLAINT (ULP) No. 450 of 2003.—*M/s. Concept Pharmaceuticals Ltd., 167, CST Road, Kalina, Santacruz (E), Mumbai 400 098 and Five Others.—Applicants.—Versus—*(1) Dr. Ravishankar Bhagwat Dubey, C/o. Kranti Kamgar Union Mumbai, A. K. Gopaman Nagar, 60 Feet Road, Mahim (E), Mumbai 400 017; (2) The Presiding Officer, XII Labour Court, Mumbai.—*Opponents.*

CORAM.—Shri P. K. Chavare, President.

Appearances.—Mr. B. D. Birajdar, Advocate for the Applicants;

Mr. V. K. Gehlot, Advocate for the Opponents.

Judgment

The learned Presiding Officer of the XII Labour Court, Mumbai, by his Order, dated 28th January 2003, passed in Complaint (ULP) No. 450 of 2003, below the application for interim relief at Exh. C-3, allowing the said application that was filed by the Complainant and being aggrieved by the said Order, the original Respondent No. 1 has come in Revision before this Court.

2. The facts that have led to the filing of the present Revision Petition are listed below.

3. The Opponent No. 1 in the Revision Petition was appointed as a Product Specialist (Herbal) on 2nd March 1998. He has done his BAMS (*i.e.* Bachelor of Medicine and Surgery). He had applied to the Respondent No. 1 Company for giving him appointment and in response to that application, he was appointed as a Product Specialist (Herbal) on 2nd March 1998. An appointment letter to that effect was given to him on 23rd March 1998. By letter dated 22nd December 2003, his services were confirmed as a Product Specialist for Pharma Division based at Mumbai. The Revision Petitioner is the Respondent No. 1 in the original Complaint which is a pharmaceutical Company engaged in the manufacture of herbal products. The original Respondent No. 2 is the Chairman/Managing Director of the said Company, the original Respondent No. 3 is the Vice President of the Sales Department, the original Respondent No. 4 is the Deputy General Manager (Sales), the original Respondent No. 5 is the Deputy General Manager (HRD and Personnel) and the original Respondent No. 6 is the Manager (Marketing and Sales).

4. On 30th March 2003, the Revision Petitioner addressed a letter to the original Complainant saying that the bill which he has submitted to meet the expenses for the month of February, 2002 was found to contain a bill issued by Hotel Asra, dated 15th February 2002, originally, it was for Rs. 230.00, but by overwriting the said figure, it has been changed to show that it was for Rs. 250. It was also stated in the letter that the said bill was not accepted and hence, the amount has been deducted. He was asked to explain this irregularity. The Respondent No. 1 did not reply this letter. Thereafter, one more letter, dated 2nd April 2002, was addressed to him stating therein that the bill which he submitted for March, 2002 reveals that there were certain short comings. He replied that letter on 18th April 2002 and made certain clarification. The employer was not satisfied with the said clarification and ultimately, the services of the employee were terminated on 14th June 2002.

5. The Complainant (Respondent No. 1), alleging that the employer has committed an unfair labour practice within the meaning of Item 1(a) and (b) of schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, (hereinafter called as, “the Act”, for the sake of brevity), claimed that his dismissal, without holding any domestic enquiry, was bad in law. It was prayed in the Complaint that a declaration be given that the Respondents have engaged in and are continuing to engaged in the unfair labour practice under Item 1(a) and (b) of schedule IV of the Act, *w.e.f.* 14th June 2002. It was also prayed that a direction be issued to the employer to reinstate the Complainant employee with full back wages and

continuity of service *w.e.f.* 14th June 2002. An additional prayer was made that during the hearing and final disposal of the Complaint, the Respondents be directed not to recruit any person in place of the Complainant employee. It was also prayed that pending the hearing and final disposal of the Complaint, the Respondents be directed to pay the wages to the Complainant employee by the end of every month if he is not allowed to report for duty. The said Complaint was filed on 12th September 2002. Alongwith the said Complaint, an application, Exh. U-3, was filed for giving interim relief.

6. The Revision Petitioner, the original Respondent No. 1, filed reply to the application for interim relief at Exh. C-2. The original Respondent No. 5 has filed the said affidavit in reply. He denied the material averments in the Complaint so far as they relate to the unfair labour practices. It was specifically claimed that the Complainant is not a 'workman' within the meaning of S. 2(s) of the Industrial Disputes Act, 1947 and consequently, not an 'employee' within the meaning of S. 3(5) of the Act. It was claimed that the Complainant is a qualified Doctor having a Degree of BAMS and was employed as a Product Specialist, a new position, created by the Respondent No. 1 Company. It was claimed that the Complainant was working independently and his main job was to take the feed-back on existing herbal products of the Respondent No. 1 Company and to do market research and give feed-back to the Company. It was claimed that the Complainant was not doing any manual, unskilled, skilled, technical, operational or clerical work and the work he was doing was totally different than that of a workman. It was stated that after discussing with the Doctors, he was giving overall feeding to the Company on herbal products. He was reporting to the Regional Sales Manager and Medical Advisor and his position, thus, was managerial and not of a workman. It was stated that the issue as to whether the Complainant is a workman or otherwise goes to the very root of the matter which requires to be decided as a preliminary issue before going into the merits of the matter. It was prayed that no relief, much less, interim relief, can be granted without deciding the issue as a preliminary issue. Without prejudice to this contention, it was further submitted that even assuming that the Complainant was a sales promotion employee, yet he cannot fall in the category of workman because the State of Maharashtra has amended the definition of employee under S. 3(5) of the Act and thereby excluded the sales promotion employees, as defined under S. 2 of the Sales Promotion Employees Act, 1976. It was also submitted that the Notification to that effect would be published shortly by the Government of Maharashtra. It was specifically mentioned that his services were terminated for committing the act of grave and serious misconduct *viz.* submitting false and fabricated bill and claiming excess money for the same. It was also stated that the preliminary investigations are made into the said mis-conduct and the company came to the conclusion that in the interest of maintaining the overall discipline in the establishment, his retention in the employment would have resulted in loss to the Respondent Company. Had he been allowed to continue, it would have become a practice in the Company as others would have followed him and there would have been a total indiscipline which is against the interest of the Company. He omitted to reply some of the clauses in the show cause notice and this indirectly means that he is guilty of dishonesty and manipulation, which is a serious mis-conduct. It was also prayed that the dismissal of the Complainant was on the charges of dishonesty, that too, after issuing him a show cause notice and merely because an enquiry has not been held, that itself does not render the termination as illegal and bad in law as the Respondent has a right to justify the action/termination by leading evidence for the first time before the Court at an appropriate stage and if the Respondent is justified in the action and proved the misconduct, the same would relate back to the date of termination and the Complainant would not be entitled to reinstatement and back wages, as claimed by him. It was specifically stated that in view of this background, no interim relief should be granted in the matter as that would tantamount to rewarding a dishonest person. It was stated that the Company is engaged in the manufacture of

pharmaceutical formulations, animal health products, bulk drugs, general and institutional products and has recently launched Herbal Division in the State of UP. It was stated that the total man-power of the Company was about 720. The Company is covered under the provisions of the Industrial Disputes Act, 1947 and it is an 'industry'. It is specifically denied that the Company is making full profit out of the business activity and that the Respondent No. 1 has good financial condition and good position in the market. It was prayed that the application for grant on interim relief be dismissed.

7. The learned Judge of the lower Court, after hearing the learned Advocates of both the parties and after considering the material before him, recorded a finding that the Complainant has proved a strong *prima facie* case and the balance of convenience was in his favour and it would cause greater hardship to the Complainant if the interim relief is not granted. The learned Judge also discussed various cases that were cited. The learned Judge further observed that the Company cannot be ordered to pay the wages without any work to be done by the Complainant. As a measure of protection or to safeguard the interest of the Company, the learned Judge observed that the Company should be directed to deposit the full back wages and continue to deposit the wages/salaries month to month till further orders. In the end, the learned Judge passed the Order as mentioned below :—

“Application Exh. U-3 is partly allowed in the following terms :

The Respondent Company is ordered and directed to deposit full wages/salary month to month in this Court till further orders. No order as to costs. Parties are at liberty to expedite the matter. Parties are at liberty to move for deciding preliminary issue of 'workman' first.”

This particular order has been challenged by the Company before this Court. Elaborate submissions have been advanced at the time of hearing of the Revision Petition and from the submissions advanced at the Bar, following Points arise for determination :

| Points | Findings |
|--|--------------------------------------|
| (i) Did the Lower Court commit an error apparent on the face of record warranting the intervention of this Court in its supervisory capacity ? | (i) Negative |
| (ii) What order ? | (ii) Revision Petition is dismissed. |

Reasons

8. Shri Birajdar, learned Advocate for the Revision Petitioner, submitted that in the Complaint, there is no whisper of victimisation and it was for the workman to spell out the act which amounts to victimisation. The termination order has been issued in writing and the reasons have been stated in detail in the said order. By overwriting on the various bills, the Complainant has made an attempt to become oversmart to dupe the Company of the amounts which, in reality, were not spent by him. It was prayed in the Written Statement itself that the Complainant being a qualified Doctor, having passed his BAMS, was not a 'workman' and unless the issue that whether he is the 'workman' or otherwise is decided as a preliminary issue, no relief could be granted, still the lower Court ignored this. A number of cases were cited by the learned Advocate for the Revision Petitioner in support of his contention. The said cases are listed below :—

(1) Hira Sugar Employees Co-op. Consumer Stores Ltd. V/s. P. P. Korvekar and Ors., 1995, I-LLJ, 1158.

(2) H. R. Adyanthaya V/s. Sandoz (India) Ltd. 1994 II-LLN, 1017.

(3) The Workmen of M/s. Firestone Tyre and Rubber Co. of India P. Ltd. V/s. The Management and Ors., 1973, LAB. IC., 851.

9. In reply, the learned Advocate, Mr. Gehelot, appearing for the employee, submitted that this Court has got limited scope in interfering with the orders of the lower Court when it is exercising the revisional jurisdiction. According to him, the permanent employee has been thrown out without holding the regular domestic enquiry and this itself amounts to victimisation and it attracts Clause No. 1(a) of Schedule IV of the Act. Unless the misconduct is proved in the enquiry, how can it be said to be an established misconduct ? According to him, so long as the Government does not issue the Notification for giving effect to the definition of the Sales Promotion employee, the Complainant would fall in the category of 'workman'. It was also submitted that the Company had filed Review Petition on 9th March 2003 and the said was also decided against it on 19th May 2003 and thereafter, the present Revision Petition has been filed on 16th June 2003.

10. In the light of the aforesaid submissions, it it to be seen as to whether the order of the lower Court, directing the employer to deposit the amount of back wages and to continue to deposit the monthly salary regularly in the Court needs to be set aside.

11. Reverting back to the order, which the lower Court has passed, a distinct reference is found in para 18 of the order that because the Company raised certain objections for allowing the application for reinstatement and in the alternative, for paying the salary during the pendency of the Complaint, it will not be fair and proper at this juncture straightway to order the Respondent Company to pay the wages or salary to the Complainant or go on paying such salary or wages without doing any work, but at the same time, it will be a protection or a safeguard to the interest of the Complainant employee if the Respondent Company is ordered and directed to deposit the full back wages and continue to deposit the wages/salary month to month in the Court till further order. Here, the learned Judge has done the balancing exercise that instead of allowing the prayer of the Complainant for reinstatement with full back wages, he has made an attempt to protect his interest by asking the employer to deposit the full back wages and continue to deposit the wages/salary month to month in the Court till further orders. The order taken care of other aspects also. These aspects include that the parties are at liberty to expedite the matter; that means, liberty is given to either of the parties to expedite the matter. If the Complainant workman feels the hardship by not getting any wages during the pendency of the Complaint, he can move the Court to expedite the matter. If the Respondent employer feels that he has been required to deposit the wages month to month, which is not the just arrangement, the Respondent Company is also at liberty to move the Court to expedite the matter. Not only this, the order specifically mentions that the parties are at liberty to move the Court for deciding the issue as to whether the Complainant is a workman or otherwise as a preliminary issue. Having left these options open, why should the employer feel a grudge ? Merely because he has been directed to deposit the salary in the Court ? In the Revision Petition, the application for staying the order of the lower Court was filed and then, the learned Advocate for the employer submitted that why should the Company be taxed by requiring it to deposit the wages in the Court ? The Court while rejecting the said application, observed that the relief awarded by the lower Court is a monetary relief in the form of depositing the wages and it will be in the ends of justice if the said order is not stayed during the pendency of the hearing of the Revision Petition. It was submitted that the Company is a well reputed Company having fairly good financial position and in the event of success of the Complaint, at the fag end, the Company will pay the entire amount that may be adjudged. Even assuming this statement to be true, the Company should not feel the grudge merely because it has been asked to deposit the amount in the Court.

12. The principal contention of the Revision Petitioner Company is that without deciding the issue that the Complainant is a workman as a preliminary issue, the Court should not have granted any relief at all. The Court actually has not asked the employer to part with the money in favour of the employee but the Court has only given a direction to deposit the said amount in the Court. It will be difficult for this Court to find fault with such a direction which appears to be fair and just. Assuming that the Company is a flourishing Company and it has means to pay any amount which may be adjudged by the Court at the time of final hearing, what harm would it cause to the Company if it is directed to deposit the money in the Court ? In case, it succeeds, it can claim money from the Court and in case, the employee succeeds, he can also get the amount that is in deposit with the Court. Thus, looking from various angles, it appears that the order of the lower Court cannot be said to be unjust requiring interference of this Court in its revisional jurisdiction. Hence, the Order.

Order

The Revision Petition is hereby dismissed.

No order as to costs.

Mumbai,

Dated the 24th November 2003.

P. K. CHAVARE,

President,

Industrial Court, Maharashtra, Mumbai.

K. G. SATHE,

Registrar,

Industrial Court, Maharashtra, Mumbai.

Dated the 5th December 2003.

IN THE INDUSTRIAL COURT, MAHARASHTRA, AT MUMBAI

BEFORE SHRI P. K. CHAVARE, PRESIDENT

REVISION APPLICATION (ULP) No. 130 of 2003.—(1) Gulf Oil Corporation Ltd., IN Centre, 49/50, M.I.D.C., 12th Road, Andheri (E.), Mumbai 400 093; (2) Mr. V. Ramesh, Executive Director, IN Centre, 49/50, M.I.D.C., 12th Road, Andheri (E), Mumbai 400 093; (3) Mr. R. Balkrishanan, Regional Accounts Manager, IN Centre, 49/50, M.I.D.C., 12th Road, Andheri (East), Mumbai 400 093.—*Applicants.—Versus—*(1) Shri Manoj R. Shah, 301, Avadhoot Krupa, Sant Dnyaneshwar Road, Mulund (E.), Mumbai 400 081; (2) Shri S. N. Kamble, Judge, 11th Labour Court, Mumbai.—*Opponents.*

CORAM.—Shri P. K. Chavare, President.

Appearances—Shri P. C. Pavaskar, Advocate for Applicants;

Shri Ravi Joshi, Advocate for Opponent.

Judgment

1. It appears that by the order dated 4th September 2003, the learned Judge of the 11th Labour Court, Mumbai had directed the employer to withdraw the termination order temporarily and allow the Complainant to join duty till they demonstrate before the Court that their termination order issued on 2nd September 2003 is in compliance of due process of law. Against that order, a Review Petition was filed which came to be rejected on 18th September 2003. A Revision has been filed against the said order and by order dated 1st October 2003, the order under Revision was stayed until further orders. In the Revision, prayer is made that this Court be pleased to stay the operation of the order dated 4th September 2003 in Complaint (ULP) No. 449 of 2003 in so far as it directs the Applicant to keep suspended and withdraw the termination order temporarily and allow the Respondent to join on duty till the Applicant demonstrate to the Respondent No. 2 that the termination order issued to the Respondent is in compliance of due process of law (Respondent No. 2 is the Judge 11th Labour Court, Mumbai). It is stated in para 9 which is a prayer clause that Record and Proceedings of Complaint (ULP) No. 449 of 2003 and Review Application (ULP) No. 6 of 2003 be called from the Respondent No. 2 and the Court be pleased to quash and set aside the order dated 18th September 2003 passed in Review Application (ULP) No. 6 of 2003 and vacated the interim order dated 4th September 2003 passed in Complaint (ULP) No. 449 of 2003.

2. Shri Pavaskar Advocate states that the orders of the Court are not in accordance with law. A statement is made at bar by Shri Joshi Advocate that when the stay was in operation in the Revision Petition, the employee has been already terminated. Therefore, the complaint is required to be amended. In the light of the submission advanced by Shri Joshi Advocate, the Court feels that it is not necessary to decide the Revision Petition on merits because once the complaint is amended, the whole nature of the proceedings would change and, therefore, Revision Petition is disposed of with a direction to the parties to appear before the Labour Court on 15th December 2003.

The Record and Proceedings shall be transmitted to the Lower Court.

P. K. CHAVARE,

President,

Mumbai,

Dated the 1st December 2003.

Industrial Court, Maharashtra, Mumbai.

K. G. SATHE,

Registrar,

Industrial Court, Maharashtra, Mumbai.

Dated the 6th December 2003.

IN THE INDUSTRIAL COURT, AT MUMBAI

COMPLAINT (ULP) No.894 of 1995.—Mrs. Regina Jacob Elengical, Dondkar Wadi, New Building, Room No. 4, Behind R.P.F., Mulund (West), Mumbai 400 081.—*Complainant*.—*Versus*—M/s. Everest Building Products Limited, Mulund Works, Mulund, Mumbai 400 080.—*Respondent*.

In the matter of a complaint of unfair labour practices under item 9 of Schedule IV of M.R.T.U. and P.U.L.P. Act, 1971.

PRESENT.—Shri P. R. Patil, Member, Industrial Court, Mumbai.

Appearances.—Mr. K. George, Advocate for Complainant;
Mr. R. S. Pai, Advocate for Respondent.

Judgment and Order

(Dated the 28th November 2003)

1. This complaint is under item 9 of Schedule IV of M.R.T.U. and P.U.L.P. Act, 1971. Complainant is claiming that Respondent company engaged in unfair labour practice under item 9 of schedule IV of M.R.T.U. and P.U.L.P. Act, by not complying with award dated 6th July 1994 passed by Labour Court, Mumbai and failure to pay salary till the date of his retirement.

2. The facts in brief of complaint are as follows :

A deceased Complainant Jacob was in the employment of Respondent till 1st May 1992. He was served with chargesheet on 22nd July 1983 and in pursuance of said chargesheet enquiry was conducted against him and after found guilty of misconduct terminated his services with effect from 11th March 1985. Deceased Complainant Jacob had challenged his termination under Reference (IDA) No. 568 of 1986 before First Labour Court, Mumbai, in which final award was passed on 6th June 1994 granting reinstatement in service and 3 increments were withheld in his time scale till his retirement from service. The Respondent is directed to pay full back wages till retirement of Jacob, subject to withholding of 3 increments. Before passing final award, deceased Jacob stands retired from service with effect from 1st May 1992 on the basis of his age mentioned in the history sheet maintained by Respondent because as per standing orders he had completed 60 years of his age. The fact of retirement came to know by deceased Jacob when Respondent filed an application dated 29th July 1992 in Reference (IDA) No. 568 of 1986. Said application was replied by Complainant deceased Jacob by his reply dated 7th August 1992 wherein he denied action of Respondent retiring him from service at the age of 60 years. The correct date of birth of Jacob is 13th June 1937, therefore, his date of retirement will be 13th June 1997 instead of 1st May 1992. Certified copy of matrimonial register kept at the Church at Kaimbore was submitted in Reference (IDA) No. 568 of 1986, deceased Jacob had communicated his correct date of birth to Respondent much prior to passing of award in Reference (IDA) No. 568 of 1986. Despite of this, deceased Jacob was superannuated taking into consideration incorrect date of birth. In fact, Respondent should have considered the date of birth of deceased Jacob entered in the matrimonial register. Without taking appropriate step on the basis of entry in matrimonial register relating to date of birth of deceased Jacob, the Respondent company has superannuated Jacob at the age of 55 years with effect from 1st May 1992. This action is against the provisions of standing orders, which amounts to unfair labour practice covered under item 9 of Schedule IV of M.R.T.U. and P.U.L.P. Act, hence filed present complaint claiming therein reliefs therein for compliance of award dated 6th June 1994 and allow deceased Complainant Jacob to resume his duty and pay salary till his retirement.

3. The Respondent company filed its written statement at Exh. C-4 in which preliminary objection was raised to maintainability of complaint because manufacturing activities and other operations in the factory discontinued with effect from 27th December 1994 and all workmen have voluntarily resigned from service after accepting their legal dues. It is denied by Respondent the action of superannuation at the age of 60 years of deceased Complainant Jacob and retiring him from service on 1st May 1993 is not correct as per his service record maintained by Respondent. It

is contended by Respondent about joining service by deceased Complainant Jacob on 2nd May 1957 and completed 35 years continuous service on 1st May 1992. According to Respondent, when deceased Complainant Jacob had joined service, he had declared his age as 25 years at that time and accordingly it was mentioned in history sheet maintained by Respondent in regular course of its business. The history sheet bears the signature of deceased Complainant Jacob. As per clause 7 of settlement dated 31st December 1974 entered between Asbestos Cement Limited and Asbestos Cement Industry and General Employees Union, the then union representing workmen, the retirement age has been fixed at 60 years. It is contended by Respondents that they have issued letter dated 29th April 1992 to deceased Complainant Jacob declaring their intention to superannuate him with effect from 1st May 1992. It is denied by Respondents the allegation of engaging in unfair labour practices covered under item 9 of Schedule IV of M.R.T.U. and P.U.L.P. Act by superannuating deceased Complainant Jacob with effect from 1st May 1992. On the basis of information about age given by deceased Complainant Jacob at the time of his entry in employment, his date of birth was recorded as 2nd May 1932 and accordingly he was superannuated from service with effect from 1st May 1992 *i.e.* on attaining his age of 60 years.

4. It is contended by Respondent that on 4th March 1992 *i.e.* 2 months before retirement of deceased Complainant Jacob came forward with the grievance to correct his date of birth. Till that date, he had neither disputed his date of birth as recorded in history sheet, nor made any grievance. Deceased Complainant Jacob for the first time by his letter dated 11th March 1992 mentioned in his application for changing date of birth. The matrimonial register kept in the Church cannot be accepted for purpose of changing the date of birth of Jacob.

5. The Complainant had filed 'N' Form known as declaration and nomination form under Employees Provident Fund Act and in said form gave his date of birth as 1st May 1932. Deceased Complainant Jacob has signed said declaration and nomination form and he never challenged the entire therein till 4th March 1992. It is contended by Respondents that they have paid all legal dues to deceased Complainant Jacob till 1st May 1992. It is denied by Respondents that date of birth of deceased Complainant Jacob is 13th June 1937, therefore, was entitled to continue in service till 1997.

6. The present complaint was filed by deceased Complainant John Alexander Elengical on 30th May 1995. On the basis of application Exh. U-8, my learned predecessor was pleased to allow wife of deceased Complainant Jacob *viz.* Regina Jacob Elengical to be party to present in complaint (as Complainant) being legal representative of deceased Jacob in view of his death as mentioned in said application, therefore, referred wife of deceased Complainant Regina as the Complainant and referred Jacob as deceased Complainant.

7. Heard the learned Advocates for Complainant and Respondent.

8. My learned predecessor was pleased to frame following issues which I reproduce and noted my findings :—

| <i>Issues</i> | <i>Findings</i> |
|---|---------------------------|
| (1) Whether the Complainant has proved that Respondents have engaged in unfair labour practice under item 9 of Schedule IV of M.R.T.U. and P.U.L.P. Act ? | No |
| (2) Whether Complainant is entitled to any reliefs as claimed in this complaint ? | No |
| (3) What order ? | Complainant is dismissed. |

Reasons

9. At the outset, there is no dispute about employment of deceased Jacob with Respondent till 1st May 1992. Jacob was served with chargesheet on 22nd July 1983 and in pursuance of said chargesheet, enquiry was conducted against him. After completion of enquiry, services of Jacob came to be terminated with effect from 11th March 1985 and this action of Respondent was challenged by Jacob before First Labour Court, Mumbai, in Reference (IDA) No. 658 of 1986. The Learned Labour Judge was pleased to pass final award in Reference (IDA) No. 658 of 1986. The operative part of said final award is reproduced below :—

“Company to reinstate the workmen and three increments of the workmen may be withheld in his time scales till his retirement from the service. The Company to pay full back wages till his retirement, subject to withholding three increments during the above referred period.”

The grievance of the Complainant is that correct date of birth of deceased Jacob as per entry in matrimonial register Exh. U-20 is 13th June 1937 and not 2nd May 1932. Xerox copy of entry in the matrimonial register Exh. U-20 is placed on record on 10th October 2003 under the list Exh. U-19 by Complainant, i.e. on the day of oral evidence given by the Complainant. The real controversy involved in the complaint is relating to the date of birth of deceased Jacob. The Complainant is trying to substantiate her grievance about the correct date of her deceased husband Jacob on the basis of her oral evidence and xerox copy of entries in the matrimonial register Exh. U-20. The name of bride-groom in the matrimonial register is Jacob Elengical and the name of bride is P. Regina. Mere exhibiting documents is not sufficient unless the concerned party proves contents of the documents. The controversy relating to the date of birth as far as cannot be resolved on the basis of oral evidence and it is always expected from the concerned party to give strict proof. Complainant has not examined the person who has taken entry in said matrimonial register Exh. U-20. Complainant failed to examine the custodian who keeps control over the matrimonial register. Complainant did not take pain to call priest who has signed said matrimonial register Exh. U-20. In absence of such evidence, the entries in matrimonial register Exh. U-20 particularly regarding date of birth of deceased Jacob cannot be said the gospel truth. Complainant Regina has stated in clear terms in cross examination that her husband Jacob was qualified upto VIIIth standard. Therefore, it was expected on the part of deceased Jacob to produce his school leaving certificate or entry in birth and death register either before Learned Labour Judge, Mumbai, in Reference (IDA) No. 658 of 1986 or in present complaint. Complainant has stated in her cross examination that she is not in a possession of school leaving certificate of her husband Jacob or his birth certificate. Further it has come in her evidence that she did not send any letter or copy of matrimonial register, marriage card to Respondent company making the Respondents aware about date of birth of Jacob. The dispute was also before Learned Labour Judge in Reference (IDA) No. 658 of 1986 because by an application dated 29th July 1992 Respondents brought to the notice the date of retirement of Jacob as 1st May 1992 and said application was replied by deceased Complainant Jacob *vide* his reply dated 7th August 1992 wherein pointed out his date of birth as 13th June 1937, therefore, his retirement with effect from 1st May 1992 was illegal and hence challenged the action. Complainant same issue raised in the present complaint and claimed legal dues of her husband Jacob till 13th June 1997, presuming to be date of birth of deceased Jacob as 13th June 1937.

10. Respondent company has examined its witness Shri D. J. Bhomkar, a retired Administrative Manager of Respondent company under whom deceased Complainant Jacob worked. Witness Bhomkar has stated that Jacob had declared his age at the time of joining service of the company as 25 years and accordingly mentioned in the history sheet Exh. C-10. The history sheet Exh. C-10 is signed by Jacob. It has come in the evidence of witness Bhomkar that on the basis of history sheet and information given by Jacob the date of birth of Jacob was mentioned in their record as 2nd May 1932. The provident fund slips of Jacob are placed on record *vide* Exh. C-11, in which date of birth of Jacob is mentioned as 2nd May 1932. This witness has further

made a statement on oath and on the basis of history sheet Exh. C-10 and PF slips Exh. C-11 the date of birth of Jacob is 2nd May 1932, therefore, he attains age of 60 years on 1st May 1992 and accordingly he was superannuated from service with effect from 1st May 1992. Learned Advocate for Respondents has placed reliance on the case of Hindustan Lever Limited V/s. S. M. Jadhav and another reported in 2001 I LLJ 1965 SC, wherein held in Para 11 :—

“In our view the impugned order cannot be sustained at all. The first Respondent cannot be allowed to raise such a dispute at the fag end of his career, Accordingly, the appeal is allowed.”

Further, he has placed reliance on the case of M.S.R.T.C. V/s. Yeshwant Shreedhar Phadke and others reported in 2000 LIC 2558 Bombay, wherein held in Para 5-A :—

“This Court has repeatedly pointed out that correction of date of birth of public servant is permissible, but that should not be done in a casual manner. Any such order must be passed on materials produced by the public servant from which the irresistible conclusion follows that the date of birth recorded in the service book was incorrect. While disposing of any such application, the Court or the Tribunal has first to examine whether the application has been made within the prescribed period under some rule or administration order. If there is no rule order passed at any period, then the Court or Tribunal has to examine, why such application was not made within a reasonable time after joining the service.”

Learned Advocate for Respondents has further relied on case of Sandoz (India) Limited another V/s. John Xavier Fernandes and another reported in 1997 III LLJ 1250 Bombay wherein held in Para 12 :—

“When an issue of this nature arises before the Court, the Court must be fully satisfied that the material produced by the concerned employee is of a conclusive nature, or to put it differently, it is irrefutable, from which the irresistible conclusion follows that the date of birth as recorded in record of the Employer is erroneous.”

Reliance is also placed by learned Advocate for Respondents on the case of Burn Standard Co. Ltd. V/s. Dinabandhu Mazumdar and another reported in 1995 II CLR 250 SC, wherein held in Para 14 :—

“No reason is given as to why towards the fag end of his service carrer of the Appellant before it, such correction should have been permitted. Moreover, even though the Matriculation produced by the Appellant before the Division Bench for the first time was seriously doubted, no opportunity had been given to the Government to make good the doubt. Having gone through the said judgement of the Division Bench in appeal, we have no hesitation in reaching the conclusion that the Division Bench was wholly unjustified in interfering with the order of the Learned Single Judge of the same Court, whereby it was held, in our view, rightly that the Appellant’s writ application filed before the Court for correction of his date of birth at the fag end of his service carrer for avoiding his superannuation which was due, cannot be entertained.”

Thus, it is clear from the ratio laid down in the above referred cases that correction in date of birth asking by an employee should not be done in casual manner and the Court is under an obligation to see the material produced by an employee from which irresistible conclusion follows that the date of birth recorded in the service book was incorrect. Also, it is clear from the ratio laid down in the above referred cases that the request of an employee for correction of his date of birth at the fag end of his service without assigning any reason of keeping silence years together needs to be examined carefully by the Court.

11. The learned Advocate for Complainant has strenuously argued on the point of entry in the history sheet Exh. C-10 and according to him, though on the basis of age mentioned in said history sheet, Respondent cannot find out correct date of birth of deceased workman Jacob. Further, he urged that it was the duty of Respondent to ascertain correct date of birth of Jacob and maintain

correct record. In support of his statement, he is placing reliance on the case of Ahmed Hussain V/s. Managing Director, U. P. State Transport Corporation and others reported in *1994 III LLJ 388 Allahabad* wherein held in Para 6 :—

“The petitioner continued as employee of the Respondent Corporatin but the authorities never tried to ascertain the correct date of birth of the petitioner. It is accepted that the petitioner is illiterate or semi-illiterate and he was not supposed to know the correct procedure of recording date of birth. In my opinion, the maintenance of service record is the responsibility of the employer and it is also the responsibility of the employer to record the correct date of birth as it is very essential for an employee’s service career.”

Further, learned Advocate for Complainant has placed reliance on the case of Gopal Krishna Ketkar V/s. Mohammed Haji Latif and others reported in *1968 BLR 48 SC* wherein held in Page 51 that :—

“Where unable to accept this argument as correct. Even if the burden of proof does not lie on a party, the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely on a certain state of facts to withhold from the Court the best evidence, which is in their possession, which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.”

Learned Advocate for Complainant is further placing reliance on the case of KCP Employees Association V/s. Management of KCP Limited and another reported in *1978 (36) FLR 217 SC* wherein held in page 219 :—

“In industrial law, interpreted and applied in the perspective of Part IV of the Constitution, the benefit of reasonable doubt on law and facts if there be such doubt, must go to the weaker section, labour.”

On the basis of ratio laid down in above referred cases, learned Advocate for Complainant trying to convince that it was the responsibility of Respondent company to ascertain the correct date of birth of Jacob and to maintain his service record, but the Respondent failed in their duty, therefore, benefit of reasonable doubt on law and facts must go to weaker section *i.e.* labour class. Sum and substance of the arguments advanced by learned Advocate for Complainant is to consider the date of birth of Jacob as per the entry made in the matrimonial register Exh. U-20 and extend benefits while paying legal dues as if Jacob was in service of Respondent till 13th June 1997. Learned Advocate for Complainant during Course of his arguments has invited attention of the Court to provisions of section 11 and 12 of Employees State Insurance Act, 1948 and provisions of section 33 and 34 of Employees Provident Fund Scheme, 1952. Provisions of section 11 of E.S.I. Act speaks about declaration by persons in employment on appointed day. According to provisions of section 11 and 12 of said Act, the responsibility is of an employee to furnish correct information to the employer on appointed day or after appointed day and the employer shall enter the particulars in the declaration form. Provisions of section 33 and 34 of E.P.F. Scheme, 1952, say that a person who is entitled to become a member of fund shall be asked forthwith by his employer to furnish and shall, on such demand, furnish to him, for communication to the Commisioner particulars concerning himself and his nomines required for the declaration form either at the time of institution of fund or even after the fund is established. On the basis of provisions referred above, learned Advocate for Complainant is advancing his argument that the duty of Respondent was to take correct entry in the service book of Jacob on the day of joining his duty and furnish it as and when demanded by him, but the Respondents failed from discharging their legal duty, therefore, benefit should go to Complainant by accepting the date of birth of Jacob as per the entry in the matrimonial register Exh. U-20 *i.e.* 13th June 1937. Even we consider the provisions of above referred Sections, the initial responsibility is of an employee (Jacob) to disclose his correct date of birth at the time of joining the service of Respondent. The deceased Complainant Jacob has disclosed his age as 25 years at the time of joining his duty, and accordingly it was entered in the history sheet Exh. C-10. On the basis of age disclosed by Jacob at the time of his initial entry in

the employment of Respondent taken into account attained age of 60 years on 1st May 1992. It is pertinent to note that after carefully perusal of history sheet Exh. C-10 in the column "date of joining" age 25 years and shown the date of joining 2nd May 1957. The fact of joining of deceased Jacob in the employment of Respondent on 2nd May 1957 is never challenged by the Complainant. When the date of joining of Jacob is 2nd May 1957 and he had disclosed his age as 25 years on the day of joining, the Respondent has taken into consideration the date of birth of Jacob may be 2nd May 1932 and accordingly Jacob was retired from service with effect from 1st May 1992.

12. The Complainant Regina has admitted in her cross examination about legal dues received by her deceased husband through cheque drawn on Bank of India Mulund Branch. Complainant Regina has admitted the amount towards provident fund received by Jacob as per the receipt dated 23rd November 1995. Documents Exh. C-21 and C-22 are the statements in respect of payment of legal dues in compliance with the award passed in Reference (IDA) No. 568 of 1986 *vide* Exh. C-15 and the payments regarding wages for the period 14th March 1985 to 1st May 1992. Document Exh. C-21 *i.e.* the statement regarding payment of wages for the period from 14th March 1985 to 1st May 1992 bears signatures of Jacob. Witness for Respondent Mr. Bhomkar has made a statement on oath about payment of wages for the period from 14th March 1985 to 1st May 1992, leave encashment, gratuity, provident fund, through cheques *vide* Exh. C-17 to C-20 and as per the letter of State Bank of India *vide* Exh. C-16. The amounts towards leave encashment, provident fund, gratuity paid to Jacob as per document Exh. C-23 to C-25 and all the documents referred above bears signature of Jacob. The letter dated 12th January 1995 Exh. C-26 sent by Jacob to Respondent company wherein mentioned that he has been lawfully superannuated from service by the Respondent on 1st May 1992. Document Exh. C-11 prepared by the Trustees of Provident Fund of Respondent company is a statement pertaining to the period after dismissal of Jacob and during said reference was pending before the Labour Court, Mumbai and the amount shown in said statement was also paid to Jacob. Thus, it is clear from the oral and documentary evidence that John had received the entire legal dues till the date of his retirement *i.e.* 1st May 1992. Having been closely gone through the oral and documentary evidence, Complainant Regina has failed to prove that the date of birth of her husband Jacob is 13th June 1937 and hence he should have been retired from service with effect from 12th June 1997. The Respondent has rightly considered the date of birth of Jacob as per the information given by him at the time of joining the service and accordingly retired him from service on 1st May 1992. The Respondents have also complied with the award dated 6th June 1994 passed in Reference (IDA) No. 568 of 1986. Jacob has received all his retirement dues and benefits. Therefore, the present complaint deserves to be dismissed as per the order passed below :—

Order

Complaint (ULP) No. 894 of 1995 is dismissed.

No order as to costs.

Mumbai,

Dated the 28th November 2003.

P. P. PATIL,

Member,

Industrial Court, Mumbai.

K. G. SATHE,

Registrar,

Industrial Court, Mumbai.

Dated the 8th December 2003.